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7-1-11

2694

No. 12927

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Serial 2693

ANN SHERIDAN,

Plaintiff, Appellee and Cross-Appellant,

vs.

RKO RADIO PICTURES, INC., a Delaware corporation,

Defendant, Appellant and Cross-Appellee.

CROSS-APPELLANT'S OPENING BRIEF.

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FOR THE NINTH CIRCUIT

ANN SHERIDAN,

Plaintiff, Appellee and Cross-Appellant,

vs.

RKO RADIO PICTURES, INC., a Delaware corporation,

Defendant, Appellant and Cross-Appellee.

CROSS-APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

Plaintiff and cross-appellant herein, Ann Sheridan, for convenience herein referred to as "Sheridan," a resident of California, is an actress engaged in the motion picture industry. Defendant and cross-appellee, RKO Radio Pictures, Inc., for convenience herein referred to as "RKO," is a Delaware corporation, engaged in the business of producing and distributing motion pictures.

The action was commenced in the United States District Court, Southern District of California, Central Division. The complaint was for damages for breach of contract. An amended complaint was subsequently filed for damages for breach of contract consisting of two

causes of action. [R. 3.] The alternative and second cause of action was subsequently stricken and the cause went to trial on the first cause of action, in which Sheridan sought damages of \$350,000 for breach of contract by RKO.

RKO, in its answer, alleged breach of contract by Sheridan and requested an award of damages in a counterclaim. [R. 17.]

The contract, dated April 29, 1949, for convenience referred to as "the contract," was admitted in evidence as Plaintiff's Exhibit 1. [R. 86.]

A pre-trial stipulation and order of court was executed on January 30, 1951, which for convenience is referred to as "the pre-trial order." [R. 40.]

It was stipulated and the District Court declared that jurisdiction existed on the basis of diversity of citizenship under 28 U. S. C. A., Section 1332. [Pretrial order, R. 42.] This court has jurisdiction under 28 U. S. C. A., Section 1291. RKO filed its notice of appeal on March 6, 1951. [R. 77.] Sheridan filed her notice of appeal [R. 78], statement of points to be relied upon on appeal [R. 621] and designation of portions of the record on March 7, 1951. [R. 623.]

After a trial before a jury a verdict was rendered in favor of Sheridan and against RKO in the sum of \$50,000, plus interest in the sum of \$5,162.42. [R. 74.] The District Court entered a judgment in favor of Sheridan and against RKO in the sum of \$55,162.42, together with

costs in the sum of \$968.42, making a total of \$56,130.84. [R. 75.]

The verdict of the jury was an adjudication that RKO had breached its employment contract with Sheridan. This verdict and the judgment based thereon is in that respect entirely favorable to Sheridan. Sheridan is not appealing from the judgment in so far as it holds that RKO was guilty of breach of contract and that Sheridan performed her part of the contract. Sheridan seeks a reversal and a new trial only on the damage issue as to whether Sheridan is entitled to damages in excess of \$50,000.00, plus interest, and on that issue only.

Complaint is made of erroneous rulings of the District Court in the pre-trial order and at the trial (1) in interpreting the contract, (2) in excluding proffered evidence as to the meaning of the phrase "minimum compensation" and as to the proper measure of damages, and (3) in refusing to give the jury appropriate instructions requested by Sheridan, as a result of which the judgment in favor of Sheridan and against RKO was limited to the sum of \$50,000, exclusive of interest. It is the position of Sheridan that once the liability of RKO for breach of contract was fixed, in the absence of the aforementioned erroneous rulings, the verdict should and would have been in favor of Sheridan and against RKO for a sum in excess of \$150,000.

Statement of the Case.

A. Statement of the Facts.

Sheridan, in 1948, entered into negotiations with Polan Banks for Sheridan to portray the leading female role in a motion picture to be produced by Polan Banks based upon his novel "Carriage Entrance." The terms and conditions of the proposed contract were reduced to writing, but not executed.

Polan Banks, through a corporation controlled by him, known as Polan Banks Productions, Inc., had negotiated with RKO for financing and distributing the picture "Carriage Entrance." A contract was entered into between RKO and Polan Banks Productions, Inc. Subsequently a suit was filed by Polan Banks Productions, Inc. against RKO for damages on account of breach of that contract.

The litigation between Polan Banks Productions, Inc. and RKO was settled by an agreement under which RKO took over from Polan Banks and from Polan Banks Productions, Inc. what was designated as a "package" which included the story and script for the picture "Carriage Entrance," the producer, Polan Banks, the artist who would portray the leading female role, Ann Sheridan, and the actor who would portray the leading male role, Robert Young. [Pre-trial order, III, items 14, 15, 16 and 17, R. 40.]

On April 29, 1949, Sheridan and RKO executed the written contract which is the basis of this litigation. [R. 86.] (For the court's convenience relevant portions of the written contract are printed on pages 1 to 17 of the appendix to this brief.)

The document bears the heading RKO Radio Pictures, Inc. preceding the word agreement. In Paragraph 1 RKO employed Sheridan to portray the leading female role in "Carriage Entrance." [App. p. 1.] Paragraph 4 specified that the term of employment was to commence no later than July 6, 1949. [App. p. 2.]

Compensation for Sheridan's services was thoroughly covered in Paragraph 6 consisting of more than two type-written pages. [App. pp. 2 to 7.]

For Sheridan's services during the first 15 weeks of the term RKO agreed as follows:

"* * * to pay * * * the sum of One Hundred Fifty Thousand Dollars (\$150,000.00) (One Hundred Thousand Dollars (\$100,000.00) of which shall be deferred and payable only from the gross receipts of the Picture * * *) said One Hundred Fifty Thousand Dollars (\$150,000.00) being hereinafter called 'the flat compensation,' plus a sum (herein called the 'percentage compensation') equal to ten percent (10%) of the net profits derived * * * from the distribution of CARRIAGE ENTRANCE * * *."

The time and manner of payment was then stated:

"(a) Fifty Thousand Dollars (\$50,000.00) on account of the flat compensation on the first regular weekly payday after the principal photography of CARRIAGE ENTRANCE has commenced, but in no event later than the seventh day after such photography has commenced;

(b) The balance of the flat compensation, to-wit: One Hundred Thousand Dollars (\$100,000.00) thereof, shall be deferred and shall be paid to Artist only from the gross receipts of CARRIAGE ENTRANCE accruing during the period of ten (10) years from

and after the first general release of CARRIAGE ENTRANCE in the United States, and otherwise at the time and in the manner hereinafter set forth;”

Subdivision (c) deals with the computation of the percentage compensation. Subdivision (d) deals with the time and manner of payment of that portion of the flat compensation which is deferred.

The next to last paragraph of this clause states that the “compensation hereinbefore specified shall constitute payment in full for Artist’s services only if the term of Artist’s employment hereunder does not exceed fifteen (15) consecutive weeks.” For time beyond 15 weeks RKO agreed to pay Sheridan “salary * * * at the rate of Ten Thousand Dollars (\$10,000.00) per week.”

The contract and attached exhibit consisted of 14 pages which included 33 numbered paragraphs. The lengthy contract was almost entirely devoted to protecting the interests of the employer, RKO.

Sheridan commenced the rendition of services and the term of her employment began on July 6, 1949. Between that date and August 17, 1949, Sheridan rendered all services required of her under the contract; such services consisted of meetings with the costume designer with reference to sketches for wardrobe to be used by Sheridan in the picture; in the fitting of 14 costumes; in discussion of make-up and hair dress with employees of RKO; in conferences and discussions with RKO executives concerning the screenplay and male actors discussed as possible substitutes for Robert Young who had originally been approved by Sheridan for the leading male role; examination of film of proposed sub-

stitutes for Robert Young. [R. 91-94, 96-98, 99-100, 101-102, 114-116, 117-122, 123-125, 126-128, 128-131.]

RKO, on August 17, 1949, notified Sheridan in writing that it would not utilize her services in the picture "Carriage Entrance" and would not pay her any compensation whatsoever in connection therewith. This written notice is Plaintiff's Exhibit 6. [R. 135.] The verdict of the jury was a determination that RKO's termination of the employment contract with Sheridan was a wrongful discharge without cause or justification.

RKO did produce the motion picture entitled "Carriage Entrance." Principal photography of "Carriage Entrance" was commenced by RKO on October 3, 1949, and was completed on November 16, 1949. RKO used the services of Ava Gardner to portray the leading female role in said picture in place of Sheridan, and used Robert Mitchum as a substitute for Robert Young to portray the leading male role in the picture. RKO had refused to assign Robert Mitchum when requested by Sheridan prior to her discharge. [Pre-trial order, III, items 10, 11 and 12, R. 40; R. 127.]

The application of the wrong measure of damages by the District Court resulted from the erroneous application by the District Court of the first sentence of Paragraph 29 of the contract, for convenience herein referred to as "the first sentence," which reads as follows:

"Producer shall not be required to use Artist's services hereunder, or to complete the production of CARRIAGE ENTRANCE, and shall be deemed to have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder." [App. p. 12.]

B. Questions Involved.

Actually, only one question is involved, and that is as to the proper measure of damages once the jury determined that RKO had broken its employment contract with Sheridan.

However, the answer to this question requires consideration of two other questions:

1. Did the District Court err in limiting Sheridan's damages to \$50,000 by reason of its holding that the first sentence of Paragraph 29 was applicable?

2. Did the District Court err, (a) in failing to interpret minimum compensation to mean \$150,000, or in the alternative, (b) in excluding parol evidence of the surrounding circumstances to show the meaning of minimum compensation to be \$150,000?

If the first question is answered in the affirmative so that the first sentence is held never to have become operative, then the second question need not be considered since such a determination should result in a direction to the District Court for a retrial on the issue of damages in excess of the amount awarded Sheridan.

On the other hand, should the first sentence be held to have been operative, then the second question may nevertheless require a reversal on the issue of damages if it is held that parol evidence should have been admitted in order to permit a determination of the meaning of the phrase "minimum compensation" to be \$150,000 rather than \$50,000. However, a ruling by this Court that "minimum compensation" meant \$150,000 is also possible, in which event judgment may be ordered for Sheridan in the correct amount.

SUPPLEMENT TO SPECIFICATION OF ERROR NO. 4.

Plaintiff's Instruction No. 6.

[R. 50-52.]

"If you find that plaintiff is entitled to a verdict pursuant to the instructions I have given you, then you must determine the damages plaintiff has suffered as a direct and proximate result of defendant's wrongful act.

"The contract provided that plaintiff was to receive two main types of compensation:

"1. Flat compensation in the sum of \$150,000.00, of which \$50,000.00 was to be paid to plaintiff one week after commencement of principal photography of the motion picture 'Carriage Entrance' and the balance of which, in the sum of \$100,000.00, was to be paid to plaintiff out of the 'gross receipts' of the picture, as this term is defined in the agreement.

"2. In addition, plaintiff was to receive 10% of the net profits of the picture.

"The verdict for plaintiff should compensate her for both elements of her compensation.

"You are not to be concerned with the first sentence of paragraph 29 of the agreement between plaintiff and defendant or the meaning of 'minimum compensation,' but you should consider whether, from all of the evidence, the picture would have earned sufficient gross receipts so that plaintiff would have received not merely the sum of \$50,000.00 which was payable one week after commencement of principal photography of the picture 'Carriage Entrance,' but instead the entire flat compensation amounting to \$150,000.00. In addition, you should also estimate the probable value of plaintiff's 10% interest in the

net profits of the picture assuming that such picture had been produced and distributed with plaintiff as the female star, as provided by the contract.

“You need not be concerned with the fact that there is no absolute certainty as to the amount of the gross receipts which the picture would have earned if it had been produced and distributed with plaintiff as the female star but you should make a just and reasonable estimate based upon all of the evidence as to whether it was probable that the picture, if so produced and distributed, would have earned sufficient gross receipts so that under the contract, plaintiff would have received the entire flat compensation of \$150,000.00.

“Similarly, you must decide, based upon your just and reasonable estimate of the probable costs and earnings of such picture, if the picture would have earned net profits and if so, you must also decide how much plaintiff’s 10% interest in such net profits would probably have amounted to.

“The verdict for plaintiff should compensate her for all damage she has suffered by reason of defendant’s acts, including the damage based upon her flat compensation and the damage measured by her percentage interest in the net profits of the picture.”

Plaintiff’s Instruction No. 6 (Alternate).

[R. 52-55.]

“(This instruction is requested only if plaintiff’s instruction No. 6 is refused.)

“If you find that plaintiff is entitled to a verdict pursuant to the instructions I have given you, then in arriving at the measure of the damages directly and proximately caused by defendant’s wrongful act, you

will render a verdict for plaintiff in the amount of the 'minimum compensation,' unless you find that defendant has waived its right to rely on the first sentence of paragraph 29 of the contract.

"The word 'Waiver' in law means an intentional relinquishment of a known right and you will consider whether the Notice of Termination to plaintiff dated August 17, 1949, stating that by reason of plaintiff's failure to approve an actor to portray the leading male role in the picture, defendant would not use plaintiff's services and would not pay plaintiff any compensation, constituted an intentional relinquishment on the part of the defendant of its right to 'be deemed to have fully performed by paying to plaintiff the minimum compensation.' If you find that defendant has waived its right to rely on this first sentence of paragraph 29, then in arriving at the damages suffered by plaintiff you will pay no consideration to paragraph 29 but you will consider what plaintiff would have received under the contract if the picture had been made with plaintiff in the leading female role.

"The contract provided that plaintiff was to receive two main types of compensation:

"1. Flat compensation in the sum of \$150,000.00, of which \$50,000 was to be paid to plaintiff one week after commencement of principal photography of the motion picture 'Carriage Entrance' and the balance of which, in the sum of \$100,000.00, was to be paid to plaintiff out of the 'gross receipts' of the picture, as this term is defined in the agreement.

"2. In addition, plaintiff was to receive 10% of the net profits of the picture.

"The verdict for plaintiff should compensate her for both elements of her compensation.

“If you find that defendant waived its right to rely on the first sentence of paragraph 29 of the agreement, you must consider whether, from all of the evidence, the picture would have earned sufficient gross receipts so that plaintiff would have received not merely the sum of \$50,000.00 which was payable one week after commencement of principal photography of the picture ‘Carriage Entrance,’ but instead the entire flat compensation amounting to \$150,000.00. In addition, you should also estimate the probable value of plaintiff’s 10% interest in the net profits of the picture assuming that such picture had been produced and distributed with plaintiff as the female star, as provided by the contract.

“You need not be concerned with the fact that there is no absolute certainty as to the amount of the gross receipts which the picture would have earned if it had been produced and distributed with plaintiff as the female star but you should make a just and reasonable estimate based upon all of the evidence as to whether it was probable that the picture, if so produced and distributed, would have earned sufficient gross receipts so that under the contract, plaintiff would have received the entire flat compensation of \$150,000.00.

“Similarly, you must decide, based upon your just and reasonable estimate of the probable costs and earnings of such picture, whether the picture would have earned net profits and if so, you must also decide how much plaintiff’s 10% interest in such net profits would probably amount to.”

Plaintiff's Instruction No. 6 (2nd Alternate)
[R. 55-56].

“(This instruction is requested only if plaintiff's instruction No. 6 is refused. If plaintiff's instruction No. 6 (Alternate) is also given, this instruction is requested with the addition of the portions enclosed in parentheses.)

“If you find that plaintiff is entitled to a verdict, then I instruct you that the first sentence of paragraph 29 is applicable and that your verdict for plaintiff must be in the amount of the ‘minimum compensation’ (unless you find that defendant has waived its right to rely on the first sentence of paragraph 29, in accordance with my previous instruction to you).

“I have considered this phrase and have determined that it is ambiguous and, accordingly, it is up to you to decide from all of the evidence you have heard what these words mean with reference to the provisions of the contract and particularly whether they mean \$50,000.00, the compensation payable one week after commencement of principal photography, as contended by defendant, or whether they mean the entire flat compensation of \$150,000, but exclusive of the percentage compensation, as contended by plaintiff. In reaching your decision as to the meaning of the phrase ‘minimum compensation,’ you must consider the evidence presented as to the usage in the motion picture industry, the testimony as to the circumstances surrounding the execution of the contract, and in view of the evidence that the defendant undertook the employment contract with plaintiff as part of a settlement of litigation with Polan Banks and a corporation controlled by him, you must also consider the language as it was understood by plaintiff and Polan Banks, as originally negotiated.”

The grounds of Sheridan's objections to the Court's refusal to adopt Sheridan's theory of the case were not repeated in connection with making objections to the Court's jury instructions and the Court's refusal to give instructions requested by Sheridan. With permission of the District Court, and in the interest of saving the Court's time, counsel for Sheridan stated the objections to the jury instructions by incorporating the pre-trial record by reference thereto. [R. 575, 605.]

During the pre-trial proceedings Sheridan proposed certain issues to be considered at the trial of the action, which rulings were excluded by pre-trial rulings of law made by the District Court. These issues proposed by Sheridan and excluded by the District Court, and the District Court's rulings of law were set forth in the Pre-Trial Stipulation and Order and made a part of the record of the trial of the action. [R. 46-49.] Set forth below is the applicable portion of the Pre-Trial Stipulation and Order:

"IV.

"ISSUES PROPOSED BY PLAINTIFF AND EXCLUDED BY RULINGS OF THE COURT.

"1. What is the meaning of the phrase 'minimum compensation' in the first sentence of Paragraph 29 of the Contract?

"At the trial plaintiff will question the witnesses with reference to the meaning of the phrase 'minimum compensation'; objections to such questions will be

made by defendant; the court will sustain defendant's objections. The plaintiff will then make an offer of proof of the evidence which would have been produced by plaintiff had the court not made its ruling.

"2. Did the first sentence of Paragraph 29 of the Contract become operative?

"Plaintiff contended that the first sentence of Paragraph 29 never became operative; that defendant elected not to take advantage of the provisions thereof if defendant had such right since defendant's notice of termination of August 17, 1949, was an election by defendant; that assuming defendant had the right to rely on the first sentence of Paragraph 29, defendant did not do so since defendant did not pay or offer to pay plaintiff the sum of \$50,000 or any other sum whatever.

"3. On the question of damages, plaintiff contended that plaintiff should be permitted to introduce evidence of damages in the amount of \$150,000.00, plus 10% of the profits which the picture would have earned if defendant had not breached the contract.

"At the trial plaintiff will question the witnesses with reference to the damages sustained by plaintiff; objections to such questions will be made by defendant; the court will sustain defendant's objections. The plaintiff will then make an offer of proof of the evidence which would have been produced by plaintiff had the court not made its ruling.

“V.

“RULINGS OF LAW BY THE COURT.

“In connection with the foregoing matters, the court has ruled as a matter of law as follows:

“1. That Paragraph 29 of the Contract, and particularly the first sentence thereof, is to be interpreted so that the sentence be considered as an integral part of the whole contract and that the obligation of defendant, if any, could be liquidated by the payment of ‘minimum compensation.’

“2. That the second phrase in the first sentence of Paragraph 29 reading, ‘or to complete the production of “Carriage Entrance”’ should have added to it the phrase ‘with the artist’ and is to be read as though said phrase appeared in the Contract.

“3. That the phrase ‘minimum compensation’ as it appears in the Contract is not so ambiguous as to meaning so as to make it necessary to go outside of the four corners of the Contract to ascertain the meaning of the words and the court states as a matter of law that the phrase ‘minimum compensation’ means \$50,000.00.

“4. That defendant at all times had a right to rely on the first sentence of Paragraph 29 of the Contract and to fully perform its obligations by paying ‘minimum compensation’ and that such right was available to defendant at all times.

“5. That the first sentence of Paragraph 29 of the Contract does not contain such contractual obligations so that only by the payment of the minimum

compensation can the defendant avail itself of that portion of the Contract.

“The court having ruled as aforesaid, it is hereby ordered that this pre-trial order and all of the matters and things set forth herein, including the rulings of the court, and the reporter’s transcript of the pre-trial proceedings, shall be made a part of the record of this trial and shall serve as a portion of the original record upon any appeal which may be taken.”

Counsel for Sheridan also objected to the instructions given to the jury and the refusal to give instructions requested by Sheridan on the ground “that under the uncontradicted evidence Paragraph 29 never became operative, either as to the first sentence or second sentence, because on the uncontradicted facts the plaintiff did approve an actor to play the leading male role, and did render services.” [R. 575-576, 605.]

The answer to these questions involves a consideration of whether the District Court erred in excluding the issues proposed by Sheridan which are set forth in Section IV of the pre-trial order [R. 40]; in excluding evidence offered by Sheridan at the trial on such issues [R. 104-112] and in refusing to give Sheridan's requested instructions 6, 6 alternate and 6 second alternate, dealing with what Sheridan proposed as the proper measure of damages. [R. 50-56.]

C. Specification of Errors Relied Upon.

1. The District Court erred in holding and declaring that the first sentence limited Sheridan's recovery to the sum of \$50,000. [Pre-trial order, V, items 1 and 3, R. 40.]
2. The District Court erred in holding that the phrase "minimum compensation" was not so ambiguous as to permit the introduction of parol evidence by Sheridan to explain the meaning of the phrase. [Pre-trial order, V, item 3, R. 40; Offer of proof, R. 104.]
3. The District Court erred in excluding evidence as to the damages Sheridan suffered by reason of RKO's breach of the contract over and above the sum of \$50,000. [Pre-trial order, IV, item 3, R. 40; Offer of proof, R. 111.]
4. The District Court erred in refusing to give to the jury Sheridan's requested instructions 6, 6 alternate and 6 second alternate, all dealing with the measure of damages. [R. 50.]

ARGUMENT.

I.

Paragraph 29 Did Not Limit Damages to \$50,000.

A. The First Sentence of Paragraph 29 Was Not Operative on August 17, 1949.

Throughout the pre-trial hearings and at the trial itself, Sheridan contended that the first sentence was not available to RKO on August 17, 1949; further, that RKO had elected not to take advantage of the provisions thereof if RKO had such right. [Pre-trial order, IV, item 2, R. 40.]

The question of election will be discussed subsequently. In this portion of the brief, it is Sheridan's position that the District Court erroneously applied the contract, drafted in its final form by the Legal Department of RKO, against Sheridan and in favor of RKO.

There were two contingencies under which RKO could make use of the first sentence:

1. If RKO did not use Sheridan's services under the contract.

On the undisputed facts, RKO did use Sheridan's services under the contract from July 6 to August 16, 1949.

2. If RKO did not complete the production of CARRIAGE ENTRANCE.

RKO did complete the production of "Carriage Entrance."

The first sentence was in the disjunctive and only in the event of the occurrence of one of the two contingencies could it become operative. The language did not

mean that RKO in the absence of either contingency might pay less than full compensation and be relieved of its obligations under the contract. It did mean that it might secure the protection of partial performance instead of full performance if either of the express contingencies actually occurred.

It may serve a useful purpose to consider, at this point, the objectives RKO sought by this clause.

There is a line of cases dealing with the employment of actors under which courts have held that there is an implied covenant to use the actor's services. These cases have permitted the recovery of damages for breach of such implied covenant over and above the amount of compensation that the actor was entitled to receive. Typical of such cases is the Australian case of *White v. Australian and New Zealand Theatres, Ltd.* (1943), 67 The Commonwealth Law Reports 266, 17 The Australian Law Journal 30.

The Australian court expressed the principle in the following quotation:

"Under a contract of this character the employer is not only bound to pay the remuneration agreed upon, but is also under an obligation to afford an opportunity to the persons employed to exercise and display their talents. *Marbe v. George Edwardes (Daly's Theatre) Ltd.* (1928), 1 K. B. 269; *Clayton and Waller v. Oliver* (1930), A. C. 209."

See:

Kramer v. Wolfe Cigar Stores Co. (Tex., 1906),
91 S. W. 775;

Sigmon v. Goldstone (1906), 101 N. Y. Supp.
984.

The first phrase of the first sentence was specifically designed to eliminate such liability.

The second phrase gives RKO the right to abandon the production. In the absence of such a clause the employee not only might have a claim by virtue of the breach of the implied covenant to make use of her services, but her actual claim for money under the contract would not be limited to any stipulated amount but would subject the employer to liability for the percentage compensation.

A party to a contract may not voluntarily put it out of his power to do what he has agreed to do. If the party does disable himself from performing, these cases hold that it is a breach of contract.

Wolf v. Marsh (1880), 54 Cal. 228, is a case of this nature. The court there held that defendant was liable on an agreement to pay moneys due under a note providing for payment out of profits even though defendant had sold the coal mine, the profits of which were to be devoted to such payment.

Accord:

Macgregor v. Union Life Insurance Co. of Omaha
(1903), 121 Fed. 493.

The second phrase is, therefore, designed to give RKO, the employer, the contractual right, without liability for damages, to disable itself from performing its part of the contract by abandoning the production of the picture.

The court below, in order to give RKO the protection of the first sentence was required to and did read it to include language not written in the contract.

Since it was beyond dispute that RKO had made use of Sheridan's services under the contract from July 6 to August 16, 1949, the court read into the first sentence two additional requirements:

(a) That the services described in the first sentence meant the services of Sheridan in the actual photography of the picture; and

(b) That the completion of production meant the completion of the production "with Ann Sheridan."

As applied by the District Court, the first sentence was read as though it had been written:

"Producer shall not be required to use Artist's services hereunder in *the photography of* CARRIAGE ENTRANCE, or to complete the production of CARRIAGE ENTRANCE *with Ann Sheridan * * *.*" (Emphasis supplied on added words.)

The interpolation of the additional words by the court was made entirely without the benefit of parol evidence of any kind whatever. The court looked at the contract and in order to give RKO the benefit thereof added the two phrases without which the plain language of the contract as written would have been of no avail to RKO.

Stockton v. Girsh (1951), 36 A. C. 634, 227 P. 2d 1;
Cal. Code Civ. Proc., Sec. 1858.

The first sentence is clearly a provision introduced solely for the benefit of the employer, RKO.

Mears Heel Co. v. Walley (1934), 71 F. 2d 876.

By no process of imagination can that clause be read as one of any benefit to the employee, Sheridan. In the

absence of any evidence other than the language in question, it is submitted that the contract should have been read as written. In any event, language should not have been added so as to permit a construction or interpretation of the contract adverse to the interest of Sheridan.

The ruling of the District Court did violence to one of the fundamental concepts of interpretation. Courts should not adopt constructions of contracts which will work forfeitures, permit injustice, or place one party at the mercy of the other.

Wood Motor Co. v. Nebel (Texas, 1950), 232 S. W. 2d 772, 776).

Attention should be directed to Paragraphs 20, 21 and 23 [App. pp. 8 to 11; 11 to 12] of the contract where RKO made specific provision for its inability to use the services of Sheridan for reasons beyond its control. Paragraph 20 is a lengthy exposition of *force majeure* under which RKO might be excused of all liability; Paragraph 21, even more lengthy, is an excuse from performance occasioned by the incapacity or illness of Sheridan, as well as by reason of breach of contract on her part; and finally, Paragraph 23 is the so-called morality clause giving RKO an additional right to terminate the contract without liability for breach of that particular provision.

The first sentence was an additional provision supplying a further contractual right to be exercised voluntarily by RKO. It gives RKO the contractual right to substitute another actress for Miss Sheridan *before* making use of her services under the contract. (Emphasis added.) It gave RKO the additional right even though it had commenced making use of Miss Sheridan's services under the

contract to abandon the production of the picture. The general intent of the contract was, however, to use Sheridan in the picture.

A primary rule of construction is to give effect to the intention of the parties as it existed at the time of the execution of the contract.

Cal. Civ. Code, Sec. 1650;

Pacific Portland Cement Co. v. Food Mach. & Chem. Corp. (1949), 178 F. 2d 541.

There is no uncertainty in the language here under scrutiny. The first clause absolves RKO of an obligation "to use the services of Artist hereunder." The word "hereunder" refers to the contract. The second clause quite clearly gave RKO the right to abandon the production of the picture. The court should have applied the contract as written.

Cal. Civ. Code, Sec. 1638.

Even if there were uncertainty, it is a settled rule in such cases that the contract is construed most strongly against the party who caused the uncertainty to exist—the party drafting the instrument, in this case, RKO.

Cal. Civ. Code, Sec. 1654;

Taylor v. J. B. Hill Co. (1948), 31 Cal. 2d 373, 189 P. 2d 258;

Maryland Casualty Co. v. I. A. C. (1918), 178 Cal. 491, 173 Pac. 993.

On the undisputed and uncontradicted facts, RKO never became entitled to the benefit of the first sentence because it did use Sheridan's services under the contract

up to and including August 16, 1949, and it did complete the production of "Carriage Entrance." Neither contingency provided for in the first sentence ever became effective so as to confer on RKO the contractual right to meet its obligations to Sheridan by paying to Sheridan the minimum compensation referred to in that first sentence, whatever meaning may be ascribed to the phrase.

B. RKO Elected Not to Rely on the First Sentence of Paragraph 29.

(1) RKO DID NOT PAY MINIMUM COMPENSATION ON AUGUST 17, 1949.

Assuming for argument's sake that by interpolation, construction and interpretation RKO was entitled to the benefits of either of the contingencies provided for in the first sentence, RKO deliberately and voluntarily failed to take advantage thereof. Only in the event of the occurrence of one of the two contingencies was RKO given the privilege of performing its obligations by paying minimum compensation instead of full compensation. We will, for this portion of our brief, assume that one such event did occur.

Even then, RKO failed to perform as permitted by the first sentence. It did not pay, offer to pay, or tender payment to Sheridan of minimum compensation, or any compensation at all. By the notice of August 17, 1949, it expressly refused to perform that portion of the contract, assuming that partial performance might have been permitted.

There is a vast difference between the payment of minimum compensation on August 17, 1949, and the payment of minimum compensation in 1951 or later un-

der the compulsion of a judgment. The difference in income tax rates alone is a source of considerable loss to Sheridan. It cannot be said to have been within the contemplation of the parties that Sheridan would have to engage lawyers and go through the time, trouble and expense of a trial in order to obtain the minimum compensation which the language said would be paid if RKO exercised the contractual right it had obtained. Sheridan's promise to accept less than full performance by RKO as provided in Paragraph 6 of the contract, was conditioned on prompt performance by RKO of its reciprocal promise to pay minimum compensation if RKO desired to take advantage of Sheridan's promise in Paragraph 29.

Alderson v. Houston (1908), 154 Cal. 1, 10, 13;

Restatement, Contracts, Secs. 251, 266, 267;

Cal. Civ. Code, Secs. 1437, 1439.

In order to achieve the result given by the District Court's ruling, it was necessary to read the last phrase in Paragraph 29 as follows:

"and shall be deemed to have fully performed by paying Artist the minimum compensation herein provided for, *not when specified in the contract but years later, if RKO fails in convincing a judge or jury that RKO is not required to pay anything whatever to Sheridan.*" (Emphasis supplied on added material.)

It is one thing to accept less than full performance as performance under the contract. It is an entirely different thing to require Sheridan to accept less than full performance after there has been a breach of the contract.

It is unfair to permit RKO to gamble on the result of a law suit and if and when it loses give it the benefit of performance although it has been adjudged guilty of a breach of contract.

It is unreasonable to hold Sheridan to performance after RKO has been adjudged guilty of breach of the contract.

It is inconsistent to hold that the contract is still in effect and RKO may still perform after a jury has rendered a verdict that RKO has broken the contract. A contract cannot be broken for one purpose and be maintained intact for another.

Alder v. Drudis (1947), 30 Cal. 2d 335, 182 P. 2d 195.

RKO having secured the extremely favorable contractual privilege provided in the first sentence was, on August 17, 1949, in a position by its voluntary act to limit its liability to minimum compensation. However, in order to do so, RKO was required to pay or tender payment to Sheridan of minimum compensation. The failure of RKO to do so was a failure of consideration for the promise of Sheridan to accept less than full performance and Sheridan was discharged of her duty to perform her promise.

Restatement, Contracts, Sec. 274, Comment c, p. 402.

This is an appropriate place to dispose of the case of *Lorentz v. RKO Radio Pictures, Inc.* (1946), 155 F. 2d 84. That case, on the language of the contract in question and on its facts, is not in point. The clause there

was expressly stated to be a waiver and release of all claims or causes of action and read as follows:

“The Producer expressly waives and releases the Corporation from all claims or causes of action based on the failure of the Corporation actually to utilize the services of the Producer or the results thereof, or on the failure of the Corporation to produce or to release or to continue the distribution of the Pictures; provided, however, that nothing contained in this Article of this agreement shall be deemed to relieve the Corporation of its obligation to pay the Producer the fixed compensation payable to him pursuant to Article 1 of Section 11 of this Agreement.”

There was no reference to an uncertain minimum compensation. The Lorentz contract referred to fixed compensation clearly described elsewhere in that contract. Lorentz had actually received fixed compensation for 40 weeks at the rate of \$1,250 per week, or a total of \$50,000. Sheridan had not received one penny and *RKO in writing had refused to pay any compensation whatever.* (Emphasis added.)

RKO had actually abandoned the Lorentz production so as to become entitled to the benefits of the release clause. In the instant case, quite the opposite is true.

Finally, in granting a motion for summary judgment on the specific causes of action described in the *Lorentz* case, there was a definite holding that the *employer* had not been guilty of a breach of contract. In the instant case the jury found and judgment was rendered that RKO did break its contract. (Emphasis added.)

On the facts and on the difference in the two contracts, the *Lorentz* case is inapplicable.

(2) ON AUGUST 17, 1949, RKO BREACHED THE CONTRACT.

The notice sent by RKO on August 17, 1949, was, by the verdict of the jury and the judgment rendered thereon, determined to be a repudiation and breach of the employment contract. It is here contended by Sheridan that the act of RKO in sending that notice was an election by RKO to consider the contract terminated and was inconsistent with RKO's subsequent claim that it thereafter had the right to rely on the first sentence and secure the benefit thereof in minimizing its liability for breach of contract.

In considering the matter of election, it will serve no useful purpose to discuss the distinction, if any, between an election of remedies and an election of rights. The same basic principle underlies both. A party may not exercise two alternative and inconsistent rights or remedies. The choice made by an election gives the party making it an advantage which he could not otherwise have had.

3 Williston on Contracts, Rev. Ed. (1936), Section 683;

Cf. Bierce v. Hutchins (1907), 205 U. S. 340, 346, 27 S. Ct. 524, 51 L. Ed. 828, in Note 2.

Williston gives as a classic example of election the case of a certain type of contract which is broken in the course of performance. According to that outstanding authority, the injured party in such cases has a clear choice presented to him, (a) of continuing with performance of the contract, or (b) of treating the contract as terminated by breach and refusing to go on with performance. The injured party in such a case is said to have a clear choice

between two alternative and inconsistent courses of conduct. If the injured party chooses to continue with performance he is said to have waived or lost his right to terminate the contract for the breach in question. Conversely, if the injured party chooses to terminate the contract for breach he cannot subsequently change his position and attempt to exact performance. The nature of the case is such that the choice of the one right is entirely inconsistent with the continued existence of the other.

Williston, *Op. Cit.*, Section 684.

On August 17, 1949, RKO had the opportunity to perform the contract by paying or tendering minimum compensation to Sheridan. What RKO actually did on that date was to send the notice of termination which the jury found to be wrongful. On August 17, 1949, RKO, instead of performing the contract, breached the contract. Performance and breach are entirely inconsistent with each other.

Alder v. Drudis, supra;

Alderson v. Houston, supra.

The distinction between performance of a contract and its frustration was the subject of a precedental decision in this Circuit in *Hopper v. Lennen & Mitchell, Inc.* (1944), 146 F. 2d 364, citing Williston, *opus cit.*, Vol. 2, Section 498; *Blake v. Voight* (N. Y. 1892), 31 N. E. 256, and other cases. These cases all point out the clear distinction between performance of a contract and its breach. One is the antithesis of the other.

In considering whether or not RKO made an election, the language of the notice of August 17, 1949, is instructive. RKO, after reciting the names of actors sub-

mitted as proposed substitutes for Robert Young, went on to state:

“by reason of your failure to approve an actor to portray the leading male role in said photoplay, we will not utilize your services in said photoplay and we will not pay you any compensation whatsoever in connection therewith.” [R. 132.]

When the notice was sent, Sheridan had either been guilty of a breach of the contract, or she had not been guilty of a breach of contract. If Sheridan had breached the contract, then RKO would have been correct in terminating the employment contract, thereby excusing any performance on its part. This is what the notice purported to do, completely to excuse performance on the part of RKO.

On the other hand, if, as the jury found, Sheridan had not been guilty of a breach of contract, RKO nevertheless had the right, if the first sentence were operative, to elect not to use Sheridan's services under the contract and to *perform* by paying or tendering payment at that time to Sheridan of “minimum compensation.” (Emphasis added.) This is not what RKO did, nor is it what RKO said in its notice of termination.

There was no doubt in the mind of RKO on August 17, 1949, as to what it wanted to do and did. It discharged Sheridan. RKO was so confident of its position that it hesitated not, but chose to take a course of action which the jury held to be a breach of contract rather than (a) to perform completely as provided in the contract, or (b) to perform pursuant to the first sentence by paying or tendering minimum compensation to Sheridan. The promise of Sheridan contained in the first sen-

tence was to accept "minimum compensation" as performance of the contract at the time when "minimum compensation" was payable, not years later and then only after payment was enforced by the compulsion of a judgment.

On this point the case of *Cummings v. Universal Pictures Company* (1944), 62 Fed. Supp. 611, affirmed 150 F. 2d 986, is on all fours. The employer had suspended the compensation payable to the employee. The employee demanded payment of salary one week after the time when the suspension should have ended. The employer's refusal to pay was held to be a justification for the termination of the contract by the employee. We quote from 62 Fed. Supp. 611 at 629:

"The several thousand words comprising this document deal almost entirely with the obligations imposed upon plaintiff or the rights granted to defendant, or both. Virtually the only right given to the former and the correlative obligation imposed on the latter by the contract—certainly the most important from his standpoint—involved his right to compensation and its liability to pay the same. The refusal to pay such compensation, therefore, constituted a very material breach of the agreement and not a mere trivial one."

The court went on to consider a proposed defense by the employer that its breach of the contract resulted from an excusable mistake from which default it desired to be relieved on consideration of paying to the employee such compensation as the court might find to be due him. The District Court pointed out that this defense was not interposed until after the lapse of more than six months after the agreement had been broken, during which period the employer had insisted that there was no obligation to pay any compensation to plaintiff, which position

was still maintained at the trial. Since the employer's refusal to pay compensation was arbitrary and unwarranted it was held not to be entitled to any relief in equity and the plaintiff was held justified in terminating the employment contract. (62 Fed. Supp. 611 at 630.)

Whether the first sentence is looked at as a bilateral contract in which the promises of Sheridan and RKO were an agreed exchange one for the other, or whether they may be described as concurrent conditions, makes little difference in the ultimate result. On principle and authority, the promise of Sheridan in the first sentence to accept less than full compensation was conditioned on concurrent performance by RKO of its obligation to pay less than full compensation, or minimum compensation. Performance of Sheridan's promise to take minimum compensation in lieu of full compensation could only be enforced if RKO determined to exercise its contractual right and perform its contractual obligation. Such performance was required at the time a decision was made on August 17, 1949, and not years later. Since RKO was guilty of a breach of contract, Sheridan as the injured party had a choice of remedies. She chose to treat the act of RKO as a repudiation of the contract and sued for damages. RKO had no right to limit such damages.

Alder v. Drudis, supra;

Restatement, Contracts, Sections 251, 266 and 267.

In *Minneapolis National Bank of Minneapolis v. Liberty National Bank* (1934), 72 F. 2d 434, plaintiff sought to establish a trust against the assets of defendant. Plaintiff recovered and judgment was reversed on appeal.

It appeared that plaintiff with knowledge of the facts had instituted suits against certain commission companies

which had sold the cattle the proceeds of which were deposited in defendant bank. These suits were settled. Defendant claimed that this barred and estopped plaintiff from maintaining this action. This position was upheld, the court saying at page 436:

“But if two inconsistent remedies are available, the exercise of one by any decisive act such as the institution of a suit with full knowledge of the facts, precludes the subsequent exercise of the other. * * * Both remedies were appropriate, but they were inconsistent because the former rested upon a disaffirmance of the transaction and the latter upon ratification of it. * * * These positions are inconsistent. Taking one constitutes an estoppel against assuming the other.”

As stated by the Honorable District Judge in the memorandum for counsel hereinbefore referred to:

“* * * producer, on August 17th, may have elected to take the position that the actress had breached her contract and if, in fact, she had not breached her contract then the producer himself was guilty of an anticipatory breach by giving the notice and would be liable for damages.

“It does not appear to the court that the paragraph involving the payment of minimum compensation is called into play, since the producer did not rely on it and did not attempt to fully perform as he could have done by paying the ‘minimum compensation,’ but instead he elected to consider the actress as having breached the contract.” [Dec. 13, 1950, memo. for counsel, R. 33 at 35.]

On the law and on the undisputed facts now before the court, a ruling is imperative that RKO elected to forego any benefit it might have been entitled to under the provisions of the first sentence.

II.

“Minimum Compensation” Did Not Mean \$50,000.

For this portion of the argument we will assume that the first sentence was operative. Based on such assumption, it is the position of Sheridan that the meaning of the phrase “minimum compensation” might vary depending upon circumstances as hereinafter more particularly specified. In the first part of this section, it is argued that the contract should be read in favor of Sheridan and against RKO. If this position is adopted, then the phrase “minimum compensation” as used in the first sentence is the equivalent of “flat compensation” as such phrase is used in Paragraph 6 [App. p. 3] and elsewhere in the contract, in which event the meaning to be attributed to the phrase is \$150,000, not \$50,000.

A. “Minimum Compensation” Meant \$150,000.

The cardinal and primary rule of interpretation is that a contract is to be read so as to give effect to the mutual intention of the parties as it existed at the time of contracting.

Cal. Civ. Code, Sec. 1636.

An examination of the contract reveals, quite clearly, the mutual intention of the parties to have been the production of the picture “Carriage Entrance” by RKO with Sheridan portraying the leading female role in that picture. It not only was intended, but it was specifically provided that Sheridan would have the opportunity to earn and receive for her services “flat compensation” in the sum of \$150,000, plus 10% of the profits described in Paragraph 6 as the “percentage compensation.”

The agreement, in its final form, was prepared by the Legal Department of RKO. In the first sentence it is RKO, the promisor, which was to pay the minimum compensation. The language of the first sentence is, therefore, to be interpreted most strongly against RKO, the party which caused the uncertainty to exist, which is also the promisor who is presumed to be such party.

Cal. Civ. Code, Sec. 1654.

When Sheridan executed the contract it was obviously the intention of both parties that she render her services and be given the opportunity not only to receive the flat compensation of \$150,000, but the percentage compensation as well. In view of this clearly expressed intention, it is a most unreasonable and strained interpretation to read the first sentence so as to give RKO, the employer, the right to breach the contract and at the same time reduce its liability for breach from the \$150,000 to one-third of that amount. The first sentence, under such circumstances, must be interpreted in the sense in which RKO believed, at the time of making it, that Sheridan understood it.

Cal. Civ. Code, Sec. 1649;

Cal. Code, Civ. Proc., Sec. 1864.

When the entire contract is read in the light of the clear intent of the parties and their words are understood in their ordinary and popular sense, then "minimum compensation" must be understood as Sheridan, the promisee, understood it, to mean the equivalent of "flat compensation," \$150,000, and not \$50,000 which is the

equivalent of nothing in the contract. [Par. 6, 22, Ex. A; App. pp. 6, 11.]

Cal. Civ. Code, Sec. 1644;

Cal. Code Civ. Proc., Sec. 1861.

Since the first sentence is a clause introduced entirely for the benefit of RKO, it should be most strongly construed against RKO and most favorably for Sheridan. Interpretation which is in favor of natural right should be adopted as against interpretation which is against it.

Cal. Code Civ. Proc., Sec. 1866;

Cummings v. Universal Pictures Company, supra;

Wood v. Nebel, supra;

Mears v. Walley, supra.

A reading of the contract to make "minimum compensation" equivalent to "flat compensation" of \$150,000 makes good sense. As was pointed out above, the purpose of the first sentence was to give RKO the contractual right either to dispense with the services of Sheridan or to abandon the production, without subjecting itself to liability for indeterminate damages or for the percentage compensation. The construction suggested by Sheridan herein effectively differentiates between the "flat compensation" of \$150,000 and the "percentage compensation" of 10% of the profits. It thereby fixes the liability of RKO in a definite amount, while at the same time giving Sheridan the assurance that she will receive at least the flat compensation and be deprived only of the opportunity to get the percentage compensation. Reading the contract in this way is entirely fair to both parties and does not work a forfeiture against Sheridan or

permit the employer to perpetrate an injustice against an employee. It preserves the intent of the parties; gives effect to the entire contract; makes the contract operative and reasonable; it uses the ordinary meaning of the words; it is in keeping with Sheridan's understanding of RKO's promises; it subordinates the particular clause to the general intent of the contract and it avoids repugnancy by subordinating the first sentence to the general intent and purpose of the entire contract.

Cal. Civ. Code, Secs. 1641, 1643, 1650 and 1652;
Code Sections, cited, *supra*.

B. Parol Evidence Should Have Been Admitted.

If after the application of the foregoing principles of interpretation there still remains doubt as to the meaning of the phrase "minimum compensation," then parol evidence of the circumstances surrounding the execution of the contract should have been admitted by the District Court as proposed by Sheridan.

Cal. Civ. Code, Sec. 1647;

Cal. Code Civ. Proc., Sec. 1860.

The lack of certainty as to the meaning of the phrase may be illustrated by reference to the pre-trial hearings at which this particular matter was discussed at great length with varying conclusions reached by the District Judge from time to time.

Memorandum filed December 13, 1950 [R. 33];

Memorandum filed January 18, 1951 [R. 38];

Pre-trial stipulation and order of January 30, 1951, V, items 1-5 [R. 40 at 47].

In the pre-trial order one of the issues proposed by Sheridan and excluded by the ruling of the District Court was the issue as to the meaning of the phrase "minimum compensation." [Pretrial order, IV, item 1, R. 46.]

At the trial, pursuant to said pre-trial order, Sheridan made an offer of proof as to the negotiations and circumstances surrounding the execution of the contract and as to the meaning of the phrase "minimum compensation," which offer of proof was objected to by RKO and sustained by the District Court. [R. 104.] At the trial Sheridan also made an offer of proof with reference to the issue of damages. [R. 111.]

This portion of the argument is based on the theory that the meaning of the phrase "minimum compensation" in the first sentence cannot be ascertained from the contract alone; that the District Court should place itself in the position of the parties who negotiated the contract; that to do so it is necessary for the District Court to hear the witnesses who negotiated the contract, so that all of the surrounding circumstances may be available. Only after hearing such evidence should meaning be given to the phrase "minimum compensation" which is nowhere specifically defined in the contract.

Under Rule 43(a), F. R. C. P., parol evidence should have been received by the District Court.

The rule of law with reference to parol evidence is that of the State of California which was binding on the District Court.

2 Federal Practice and Procedure, Barron and Holtzoff (1950), Section 962, page 678;

Black v. Richfield Oil Corporation (1941), 41 Fed. Supp. 988, affirmed 146 F. 2d 801, cert. den. 65 S. Ct. 1404, 325 U. S. 867;

Patterson Ballagh Corporation v. Byron Jackson Co. (1944), 145 F. 2d 786.

In the last cited case the Court referred to Section 1860 of the California Code of Civil Procedure and the leading California case of *Lemm v. Stillwater Land and Cattle Co.* (1933), 217 Cal. 474, 19 P. 2d 785, as authority for the admission of evidence concerning the circumstances surrounding the parties at the time they contracted, including the object, nature and subject matter of the agreement and the preliminary negotiations, for the purpose of placing the court in the same situation in which the parties found themselves.

Estate of Rule (1944), 25 Cal. 2d 1, 152 P. 2d 1003;

Woodbine v. Van Horn (1946), 29 Cal. 2d 95, 173 P. 2d 17;

Williston, *Op. Cit.*, Section 629;

Restatement, Contracts, Section 235(d).

The standard of interpretation to be used, both on authority and on principle, is that by which the court ascertains the ordinary meaning of the writing to the

parties of the kind who contracted at the time and place where the contract was made and with such circumstances as surrounded its making.

Williston, *Op. Cit.*, Section 607, page 1740; Section 616, page 1774, note 4;

Restatement, Contracts, Sections 320 and 227, Comment a(2);

Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., *supra*;

Barham v. Barham (1949), 33 Cal. 2d 416, 202 P. 2d 289.

An appellate court is not bound by the trial court's construction of a contract where the decision of that court was based solely on the terms of the written instrument.

Overton v. Vita-Food Corporation (1949), 94 Cal. App. 2d 367, 210 P. 2d 757.

The word "compensation" is used in the contract in combination with other words. In Paragraph 6 [App. 3] it is stated that Sheridan is to receive "flat compensation" in the amount of \$150,000. In the same paragraph it is provided that in addition to the flat compensation Sheridan would be entitled to receive 10% of the net profits of the picture, which was called "percentage compensation." It is significant to observe how precise the draftsman was in Paragraph 6 in making clear what "flat compensation" and "percentage compensation" were.

If the draftsman in the first sentence intended "minimum compensation" to mean something other than "flat compensation," he could very easily have been as explicit there as he was in Paragraph 6.

The "flat compensation" itself was to be paid in the manner specified in that paragraph; the sum of \$50,000 was expressly stated to be a payment "on account" of the flat compensation.

RKO argued that \$50,000 was synonymous with minimum compensation since that was the "least" amount which Sheridan might have received under the contract.

This argument not only does violence to the plain language of the contract but is self-defeating. As is provided in this same Paragraph 6, had Sheridan's employment continued for a consecutive period in excess of 15 weeks, RKO would have been obligated to pay additional compensation at the rate of \$10,000 per week. Under such circumstances, the "least" amount of money which Sheridan would have been entitled to receive under the contract would not be the sum of \$50,000, but the sum of \$50,000, plus \$10,000 per week for each week in excess of 15. Thus, if Sheridan's services had been used continuously for a period of 20 consecutive weeks and if RKO had then elected to abandon completion of the picture under the provisions of Paragraph 29, RKO would have been obligated to pay to Sheridan on its own argument the sum of \$10,000 per week for the 5 weeks beyond 15 weeks, in which event Sheridan would have been entitled to receive a total of \$100,000, which would consist of \$50,000 paid one week after commencement of principal photography, plus 5 weeks at \$10,000 per week. "Minimum compensation" then would mean \$100,000, not

\$50,000 since \$100,000 would be "the least compensation" which Sheridan would be entitled to receive under the provisions of the first sentence.

Looking at the contract without reference to extrinsic evidence it is not possible, fairly, to say that the phrase "minimum compensation" in Paragraph 29 must be taken to mean "least compensation," nor must the phrase "least compensation" be made the equivalent of \$50,000 merely because that amount was the amount which would have been required to be paid Sheridan one week after principal photography commenced.

If the meaning of "minimum compensation" is to be found only within the four corners of the contract, then the hypothesis that minimum compensation should be equated with the phrase "flat compensation" is much more tenable since such equation would serve the purpose of eliminating percentage compensation from the amount to which Sheridan would be entitled, thereby limiting RKO's obligation to \$150,000.

The motion picture industry has certain technical or trade terms or usages which are peculiar to it. This contract itself uses the phrases "flat compensation," "deferred compensation," "percentage compensation" and "minimum compensation." These are certainly technical or trade terms which could bear elucidation. The testimony of those skilled in the art or expert in the field is admissible to explain the meaning of technical or trade terms used.

Cal. Civ. Code, Section 1645, and cases cited *supra*.

Where more than one meaning may reasonably be ascribed to a phrase it may then fairly be said that the contract contains ambiguities. In such case parol evidence should be admitted to explain the contract.

Cal. Civ. Code, Section 1647, and cases cited *supra*.

It has been said by an authority as eminent as Learned Hand:

“* * * but, in ascertaining what meaning to impute, the circumstances in which the words are used is always relevant and usually indispensable.”

New York Trust Co. v. Island Oil & Transport Corp. (1929), 34 F. 2d 655, 656.

From what has been said and from the authorities cited, it is respectfully submitted that the District Court erred in excluding Sheridan's offers of proof with reference to the meaning of the phrase “minimum compensation” and the measure of damages.

Had the court permitted such evidence to be introduced, the jury would have been in a position to find as a fact the meaning to be given to the phrase “minimum compensation” and to award damages to Sheridan based upon that meaning and upon the evidence of damages which would have been before the jury.

In view of the verdict of the jury that RKO had broken the contract, the errors of the District Court have resulted in a limitation of the damages awarded to a sum grossly disproportionate to the amount of damages actually suffered by Sheridan.

III.

**The Judgment for Sheridan Should Be Affirmed and
the Cause Remanded for Retrial Only on the Issue
of Sheridan's Damages in Excess of \$50,000.00
Only.**

There was a complete and fair hearing of the issues as to whether RKO or Sheridan breached the employment contract between them. In rendering a verdict for Sheridan on RKO's counterclaim, the jury found that Sheridan did not breach the employment contract. The jury also found that RKO breached the employment contract and awarded damages to Sheridan on her complaint in the full amount permitted by the instructions given to the jury by the trial court.

A trial by jury having been had on the issues of liability for breach of contract, there is no reason to re-litigate those issues.

If either of the two positions taken by Sheridan with reference to the first sentence is correct, then a retrial should be ordered for the single purpose of fixing the proper measure of damages to be awarded Sheridan as damages for RKO's breach of contract. The damages should not be limited to the sum of \$50,000.00. The measure of damages is the detriment suffered by Sheridan.

It is respectfully urged by Sheridan that this court should affirm the judgment in so far as it awards Sheridan the sum of \$50,000.00 plus interest and remand the cause for further proceedings in the trial court on the issue

of the liability of RKO to Sheridan in excess of the amount already awarded and in conformity with this court's opinion in the decision rendered by it herein.

Rule 59(a), F. R. C. P.;

Gasoline Products Co. v. Champlin Refining Co.
(1931), 283 U. S. 494, 51 S. Ct. 513;

Board of Public Instruction v. Osburn (1939),
101 F. 2d 919, 923;

*Mass. Bonding & Ins. Co. v. John R. Thompson
Co.* (1937), 88 F. 2d 825, 832-33;

Mutual Life Ins. Co. v. Sayre (1936), 81 F. 2d
752;

Detroit Graphite Co. v. Hoover (1930), 41 F. 2d
490;

Cf. Yellow Cab Co. v. Keane (1937), 93 F. 2d 290.

Respectfully submitted,

GANG, KOPP & TYRE,

MARTIN GANG and

MILTON A. RUDIN,

Attorneys for Appellant, Ann Sheridan.

APPENDIX.

Exhibit 1.

RKO RADIO PICTURES, INC.

AGREEMENT.

This Agreement, made and entered into at Los Angeles, California, this 29th day of April, 1949, by and between RKO Radio Pictures, Inc., a Delaware corporation, hereinafter called "Producer," and Ann Sheridan, hereinafter called "Artist,"

WITNESSETH:

1. Producer hereby employs Artist as an actress, performer and entertainer to portray the leading female role in the photoplay now entitled "Carriage Entrance" to be produced by Producer. Said photoplay may hereinafter be referred to as "Carriage Entrance," or as the "Picture," or as the "photoplay." Artist shall not, however, be required to render any services pursuant hereto unless and until she has approved each and all of the following:

- (a) The final shooting script of the screenplay for Carriage Entrance;
- (b) The director who will direct Carriage Entrance; and
- (c) The actor who will portray the leading male role in Carriage Entrance.

With respect to item (a) above, the Artist has heretofore approved the first draft estimating script entitled "Carriage Entrance," by Leopold Atlas, consisting of a one (1) page note, one hundred forty-eight (148) pages

of screenplay and five (5) pages of synopsis covering the unfinished ending, all of which material is hereinafter referred to as the "Estimating Script," subject to such Estimating Script being completed and "polished." The Artist agrees that she shall not have the right to disapprove of the final shooting script if it is a reasonable completion and development of the Estimating Script or does not depart from the novel Carriage Entrance and the Estimating Script so as to substantially alter and diminish the importance of the Artist's role as written in the novel Carriage Entrance and in the Estimating Script.

* * * * *

4. The term of Artist's employment hereunder shall start on such date as Producer may hereafter specify to Artist in writing, which date, however, shall not be earlier than June 1, 1949, nor later than July 6, 1949. Such starting date, however, shall be subject to the completion by Artist of her services in connection with the principal photography of the photoplay originally entitled "I Was a Male War Bride." If Artist has not completed such services before the starting date specified by Producer pursuant hereto, such starting date shall automatically be postponed until the day following the completion of such services by Artist.

Said term shall continue after the starting date thereof until Artist has completed all of her services in connection with the principal photography of Carriage Entrance.

* * * * *

6. On condition that Artist fully performs all of her obligations hereunder and as payment in full for Artist's services during the first fifteen (15) weeks of the term

hereof (exclusive of periods of suspension) or such lesser period as may constitute the term hereof, and for all rights granted and/or agreed to be granted by Artist hereunder, Producer agrees to pay, or cause to be paid to, Artist the sum of One Hundred Fifty Thousand Dollars (\$150,000.00) (One Hundred Thousand Dollars (\$100,000.00) of which shall be deferred and payable only from the gross receipts of the Picture, as herein-after provided), said One Hundred Fifty Thousand Dollars (\$150,000.00) being hereinafter called "the flat compensation," plus a sum (herein called the "percentage compensation") equal to ten percent (10%) of the net profits derived by Producer and its successors and assigns, from the distribution of Carriage Entrance, accruing during the period of ten (10) years from and after the first general release of Carriage Entrance in the United States. Artist's compensation shall be payable as follows:

- (a) Fifty Thousand Dollars (\$50,000.00) on account of the flat compensation on the first regular weekly payday after the principal photography of Carriage Entrance has commenced, but in no event later than the seventh day after such photography has commenced;
- (b) The balance of the flat compensation, to wit: One Hundred Thousand Dollars (\$100,000.00) thereof, shall be deferred and shall be paid to Artist only from the gross receipts of Carriage Entrance accruing during the period of ten (10) years from and after the first general release of Carriage Entrance in the United States, and otherwise at the time and in the manner hereinafter set forth;

- (c) The percentage compensation, and that portion of the flat compensation which is deferred, as aforesaid, shall, except as hereinafter provided, be computed and determined in accordance with the provisions of Articles 15A, 15B, 15C and 15D of the employment agreement dated April 29, 1949 between Producer and Polan Banks, a true copy of which is attached hereto, marked Exhibit "A" and by this reference made a part hereof. Wherever necessary, references to the "Producer" in said Exhibit "A" shall be deemed, for the purposes of this agreement, to be references to the Artist, and wherever necessary, references to the "Corporation" in said Exhibit "A" shall be deemed, for the purposes of this agreement, to be references to Producer. The statement in said Exhibit "A" to the effect that the Producer shall not be entitled to any share of the net profits of the Picture shall not, of course, apply under this agreement.

Producer warrants, so far as Artist is concerned, that the amounts payable under item (1) of subdivision (c) of Article 15D of said Exhibit "A" will not exceed Sixty Thousand Dollars (\$60,000.00).

- (d) That portion of the flat compensation which is deferred as aforesaid, shall be paid at the times and in the manner set forth in this subdivision (d), rather than at the times and in the manner set forth in Exhibit "A".

Said deferred flat compensation shall not be paid or payable to the Artist earlier than as follows:

	<u>Payable not earlier than:</u>
The first \$20,000 thereof	January 1, 1950
The next \$20,000 thereof	January 1, 1951
The next \$20,000 thereof	January 1, 1952
The next \$20,000 thereof	January 1, 1953
The next \$20,000 thereof	January 1, 1954

That portion of the first Twenty Thousand Dollars (\$20,000.00) of said deferred flat compensation which accrues from the gross receipts of the Picture prior to or during the calendar year 1950 shall be paid to the Artist in installments of Five Hundred Dollars (\$500.00) per week, commencing on Producer's first regular payday during the calendar year 1950, and continuing throughout said calendar year, but only if and to the extent that said first Twenty Thousand Dollars (\$20,000.00) is or becomes payable from the gross receipts of the Picture; provided, however, that if said entire first Twenty Thousand Dollars (\$20,000.00) is or becomes payable during said calendar year, Producer may omit twelve (12) of said weekly payments to be made during said calendar year. As to any part of said first Twenty Thousand Dollars (\$20,000.00) which does not accrue from the gross receipts of the Picture during said calendar year, the same shall be payable to the Artist at the times and in the manner set forth in Exhibit "A".

With respect to the second, third, fourth and fifth Twenty Thousand Dollars (\$20,000.00) of

said deferred flat compensation, the same procedure shall be followed with respect to the calendar years 1951, 1952, 1953 and 1954 respectively.

Producer has heretofore delivered to Artist a copy of the Production-Distribution Agreement referred to in Exhibit "A", and Producer warrants that the same is a true copy thereof. The Producer agrees to deliver all statements of gross receipts to the Artist, and to make its books and records available to the Artist, and to make deposits to the account of the Artist, all at the times and in the manner provided for for the benefit of the "Producer" in Articles 3, 4, 5 and 6 of Section VII of the Production-Distribution Agreement referred to in Article 15A of said Exhibit "A".

Anything herein contained to the contrary notwithstanding, the compensation hereinbefore specified shall constitute payment in full for Artist's services only if the term of Artist's employment hereunder does not exceed fifteen (15) consecutive weeks. If said term, exclusive of any periods of suspension permitted hereunder, shall continue beyond fifteen (15) consecutive weeks, Producer agrees to pay Artist in addition to such compensation salary for the time said term continues beyond fifteen (15) weeks at the rate of Ten Thousand Dollars (\$10,000.00) per week. Artist shall be paid on a pro rata basis for any incomplete week at the end of such additional time, and, for the purpose of such prorating, one day's salary shall be One Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents (\$1,666.66). Salary for such additional time shall be paid to the Artist each week during the time said term continues beyond fifteen (15) weeks as aforesaid.

Artist shall not have any right, title or interest in or to Carriage Entrance, and Artist's interest in the net profits thereof shall not constitute a lien thereon or an assignment of the proceeds therefrom. Producer shall have the right to pledge, mortgage, assign, or otherwise hypothecate Carriage Entrance or the proceeds therefrom, either in whole or in part, without obtaining Artist's consent; provided, however, that no such pledge, mortgage, assignment or other hypothecation shall in any manner limit or impair any of Artist's rights hereunder. Artist acknowledges that Producer has not made, and does not now make, any representation with respect to the gross receipts or net profits to be derived or received from Carriage Entrance. Producer shall have full charge and control of the manner in which, and the terms upon which, Carriage Entrance shall be distributed, sold, exhibited and/or exploited, as well as all matters and things pertaining thereto.

* * * * *

12. If the term of Artist's employment hereunder shall begin later than the earliest date permitted therefor pursuant to paragraph 4, Artist agrees to report to Producer's studio or elsewhere when and as directed by Producer during the period (not exceeding, however, one week) prior to the starting date of said term, and to appear, assist and take part in tests, wardrobe fittings, conferences, publicity interviews, rehearsals, still photographs and the like in connection with Carriage Entrance, but Artist shall not in any event be required so to report during the period of thirty (30) days following Artist's return to Los Angeles. Artist shall not be entitled to

any compensation for services rendered pursuant to this paragraph in addition to that specified in paragraph 6.

* * * * *

20. If during the term hereof Producer shall be hampered, interrupted or interfered with in the normal conduct of its business by epidemic, fire, action of the elements, strikes, walkouts, lockouts, labor disputes, governmental law, regulation, ordinance, or order, court or executive decree or order, the act of God or of a public enemy, war, riot, civil commotion, earthquake, flood, accident, explosion, casualty, embargo, delay of a common carrier or other cause beyond its control of a similar nature, or if the production of the photoplay in which Artist is appearing or is scheduled to appear, is hampered, interrupted, interfered with or postponed by reason of any such cause, or by the illness, incapacity or refusal to perform of the director or of a principal member of the cast (other than Artist) of such photoplay, then, in any of such events, Producer may suspend this agreement during any such hampering, interruption, interference, postponement, closing or cessation. If any such suspension shall continue beyond an aggregate of four (4) weeks during the term hereof, either Producer or Artist may elect to terminate this agreement at any time thereafter while such suspension continues by notice to the other to that effect, provided, however, if Producer shall notify Artist within three (3) days after receipt of any such notice from Artist that Producer elects to terminate such suspension, such suspension shall terminate, and this agreement shall remain in effect notwithstanding Artist's notice of termination. In the event of any such termination, Producer and Artist shall each be released from all further obliga-

tion to the other under this agreement, except as set forth in paragraph 22 thereof.

21. If Artist is incapacitated or prevented from performing any or all of Artist's obligations hereunder by reason of sickness, disfigurement, impairment of voice, or by reason of any other disability, or if Artist's appearance or physical makeup shall be altered or changed to such an extent that Artist shall not have Artist's present unique and unusual value as an actress, performer or entertainer, or if Artist shall fail, refuse or neglect to perform any of Artist's obligations hereunder, or if Artist shall indicate, either personally or through Artist's representative, that Artist will at a future time fail, refuse or neglect to perform any of Artist's obligations hereunder, Producer may, at its election, suspend this agreement during any part of such incapacity, prevention, alteration, change, failure, refusal, neglect or indication of a future failure, refusal or neglect, and thereafter as hereinafter in this paragraph provided. Any such suspension due to any indication of a future failure, refusal or neglect may be continued from the time of such indication until Artist shall personally report to Producer, in the manner hereinafter provided, and thereafter, as hereinafter in this paragraph provided. No such suspension shall prejudice Producer's right to terminate this agreement at any time for any of the reasons herein specified, and shall be deemed cumulative and not exclusive of any other remedy to which Producer may be entitled at law or in equity. Producer may terminate this agreement if Artist should at any time fail, refuse or neglect to perform any of Artist's obligations pursuant hereto, or if Artist should indicate, either personally or through Artist's representa-

tive that Artist will at a future time fail, refuse or neglect to observe or perform any of Artist's obligations hereunder, or if Artist shall in any other manner breach this agreement, or if any incapacity, prevention, alteration or change as hereinbefore referred to shall continue for an aggregate of five (5) days or more. Producer shall not be liable to Artist for any compensation hereunder after this agreement shall have been so terminated, except as is set forth in paragraph 22 hereof. If Producer terminates this agreement pursuant to this paragraph 21 during the first five weeks of the term hereof (exclusive of any periods of suspension permitted hereunder), Artist shall refund to Producer such pro rata portion of the Fifty Thousand Dollars (\$50,000.00) compensation theretofore received by Artist pursuant to (a) of paragraph 6 as is represented by that portion of such first five (5) weeks as occurs after such termination. For the purpose of such prorating, one week's compensation shall be taken to be Ten Thousand Dollars (\$10,000.00), and any part of an incomplete week shall be calculated on the basis of One Thousand Six Hundred Sixty-six Dollars and Sixty-six cents (\$1,666.66) per day. If Artist shall, in good faith, while any suspension shall continue (and provided this agreement shall not in the meantime have been terminated by Producer) personally report to Producer ready, willing and able to resume the performance of Artist's obligations to Producer's satisfaction, Producer may nevertheless continue such suspension for a period of time (but not exceeding eight (8) weeks) necessary to make preparation for the actual utilization of Artist's services; provided, however, no such further suspension shall prejudice Producer's

right to terminate this agreement at any time for any of the reasons herein specified, and shall be deemed cumulative and not exclusive of any other remedy to which Producer may be entitled at law or in equity.

22. Artist shall not be entitled to any compensation for any time during which this agreement is suspended. If this agreement is terminated pursuant to paragraph 20 or paragraph 21 and Carriage Entrance is thereafter released for general distribution with Artist appearing therein, Artist's flat compensation shall be prorated for the time the term of her employment hereunder continued (exclusive of periods of suspension) prior to such termination at the rate of Ten Thousand Dollars (\$10,000.00) per week, and for the purpose of prorating any portion of an unfinished week one day's compensation shall be One Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents (\$1,666.66). Any compensation theretofore received hereunder by Artist shall be credited against any such payment. Any flat compensation to which Artist may so become entitled in excess of Fifty Thousand Dollars (\$50,000.00) shall be deferred and paid to Artist as set forth in (b) of paragraph 6. In the contingency provided for in this paragraph 22, Artist's right to receive the percentage compensation provided for in paragraph 6 shall not be affected.

23. Artist shall perform the services herein contracted for in a manner that shall be conducive to the best interests of Producer, and to the best interests of the motion picture industry generally, and if Artist shall at any time during the term hereof, or during the distribution of CARRIAGE ENTRANCE, either while rendering services hereunder or in Artists private life, commit an offense involv-

ing moral turpitude under federal, state, or local laws or ordinances, or if during any such time Artist's conduct shall offend against decency, morality, or social proprieties, or shall cause Artist to be held in public ridicule, scorn, or contempt or cause public scandal, then and upon the happening of any of such events Producer may terminate this agreement at any time within four (4) weeks thereafter and be released from all of its obligations to Artist hereunder; provided, however, that if any such event occurs after the Artist has completed all services required of her hereunder, Producer may not terminate this agreement, but shall thereafter be relieved of its obligations under Article 30 hereof.

* * * * *

29. Producer shall not be required to use Artist's services hereunder or to complete the production of Carriage Entrance, and shall be deemed to have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder. However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder.

* * * * *

In Witness Whereof, the parties hereto have executed this agreement the day and year first above written.

RKO RADIO PICTURES, INC.

By GORDON E. YOUNGMAN

Vice President

ANN SHERIDAN

(Ann Sheridan)

EXHIBIT "A"

EXCERPTS FROM AGREEMENT BETWEEN RKO RADIO
PICTURES, INC. AND POLAN BANKS

DATED APRIL, 1949

15A. For the purpose of computing the Producer's Deferred Fixed Compensation and determining the time and manner of payment thereof, it is hereby agreed that the provisions of:

Article 4, Section III;

All of Section V, except the third, fourth, sixth, seventh and eighth paragraphs of Article 3 thereof, and except the whole of Article 4 thereof;

Articles 1 and 2 of Section VI; and

Articles 3, 4, 5 and 6 of Section VII

of that certain agreement between the Corporation and Polan Banks Productions, Inc., a California corporation, dated January 1, 1949, herein called the "Production-Distribution Agreement", (which Production-Distribution Agreement covered the production and distribution of the Picture and which Production-Distribution Agreement has heretofore been terminated and cancelled) shall apply in all respects, and such provisions are hereby incorporated herein by reference to the same extent as if fully set forth herein, subject to the provisions of this agreement; it being understood that references to the "Distributor" contained in the Production-Distribution Agreement shall be deemed, for the purposes of this agreement, to mean the Corporation.

15B. The "negative cost" or "production cost" of the Picture shall mean the final cost of producing the Picture, computed and determined by the Corporation, except as herein expressly provided, in accordance with the method and system from time to time being used by the Corporation in determining the negative cost of its other motion pictures.

Direct costs which cannot be fixed definitely at the time incurred or which must be allocated between motion pictures shall be computed and charged to the negative cost of the Picture in the same manner as that in which such costs would have been computed and charged against similar motion pictures produced by the Corporation. If the Producer maintains that any such charge has not been computed in such manner, the matter shall be submitted within five (5) days to the certified public accountants at the time engaged to audit the books of the Corporation, and the determination of such accountants shall be binding on the parties. The charges of such accountants shall be borne by the party against whom such finding is made or shared by the parties in the proportion in which such finding is made against them.

It is expressly agreed, but without limiting the items which will constitute direct charges against the negative cost of the Picture, that the following items shall be considered direct costs, and that the charge for Studio Overhead shall be made with respect thereto:

[O.G.H.] purchase price for the

- (a) The deferred/ motion picture rights in the novel "Carriage Entrance" and the deferred purchase price for the screenplay of the Picture which is payable to Polan Banks Productions, Inc.;

- (b) The Deferred Fixed Compensation of the Producer hereunder;
- (c) That portion of the flat compensation of Ann Sheridan which is deferred and payable from the gross receipts of the Picture (as distinguished from her percentage compensation based on the net profits of the Picture);
- (d) The cost of the Corporation's recording contract orchestra on the basis of the Corporation's cost therefor, plus an allocation for the unallocated salary of said recording contract orchestra, computed in the same manner as the Corporation computes said cost for the Corporation's other motion pictures, provided that the charge for the unallocated salary will not be in excess of seventy-five per cent (75%) of the charge on a cost basis of the Corporation's recording contract orchestra.

15C. In addition to the direct charges provided for above, the Corporation shall charge against the negative cost of the Picture on account of indirect costs an amount computed in all respects in the same manner as the "Studio Rental" is computed under the provisions of Article 21, Section I of the Production-Distribution Agreement. Said charge is herein called the "Studio Overhead."

It is specifically agreed that the charge for Studio Overhead with respect to the services of Ann Sheridan during the first fifteen (15) weeks of her employment in connection with the Picture will be limited to twenty-five per cent (25%) of the One Hundred Fifty Thousand Dollars (\$150,000.00) flat compensation payable to her

pursuant to the Corporation's employment agreement with her; provided, however, that if the Corporation becomes obligated to pay, and pays, to Ann Sheridan any penalties for violations of required rest periods under the Corporation's agreement with Screen Actors Guild, Inc., Studio Overhead will be charged with respect thereto. Studio Overhead will, of course, be charged with respect to all pro rata compensation payable to Ann Sheridan for services rendered after the expiration of said fifteen (15) week period.

15D. After the Corporation recoups the distribution fees referred to in Article 2, Section VI of the Production-Distribution Agreement, the remainder of the gross receipts of the Picture shall be applied as follows:

- (a) To reimburse the Corporation for the direct distribution expenses;
- (b) To reimburse the Corporation for the negative cost of the Picture, including the charge for Studio Overhead but not including the items referred to in subdivisions (a), (b) and (c) of Article 15B;
- (c) To pay the following, *pari passu*:
 - (1) Items (a) and (b) of Article 15B, it being understood that said item (a) shall be paid in full before any sums are paid with respect to said item (b);
 - (2) Item (c) of Article 15B.

The amounts payable under this subdivision (c) shall in no event exceed One Hundred Sixty Thousand Dollars (\$160,000.00).

Any balance of the gross receipts thereafter remaining shall be considered the net profits of the Picture. If the gross receipts of the Picture shall not be sufficient during the period of ten (10) years from and after the first general release of the Picture in the United States to permit the payment of all of the foregoing items, the deficiency shall be considered to be the net loss of the Picture. The Producer shall not be entitled to any share of the net profits of the Picture nor shall he be required to contribute to the net loss of the Picture.

Whenever any reference is made in the portions of the Production-Distribution Agreement which are incorporated herein under the provisions of Article 15A, to Articles 3 or 4 of Section VI of the Production-Distribution Agreement, such references shall, for the purposes of this agreement, be deemed to refer to the provisions of this Article. The reference in subdivision (c) of Article 6, Section VII of the Production-Distribution Agreement to subdivisions (b), (d), (e) and (f) of Article 3 of Section VI thereof shall, for the purposes of this agreement, be deemed to be a reference to subdivision (b) of this Article.

No. 12927.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RKO RADIO PICTURES, INC., a corporation,

Appellant,

vs.

ANN SHERIDAN,

Appellee,

and

ANN SHERIDAN,

Appellant,

vs.

RKO RADIO PICTURES, INC., a corporation,

Appellee.

BRIEF OF APPELLANT RKO RADIO PICTURES, INC.

MITCHELL, SILBERBERG & KNUPP, and
GUY KNUPP,

727 West Seventh Street,
Los Angeles 17, California,

Attorneys for Appellant.

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No. 12927.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

RKO RADIO PICTURES, INC., a corporation,

Appellant,

vs.

ANN SHERIDAN,

Appellee,

and

ANN SHERIDAN,

Appellant,

vs.

RKO RADIO PICTURES, INC., a corporation,

Appellee.

**BRIEF OF APPELLANT RKO RADIO
PICTURES, INC.**

Jurisdiction.

Jurisdiction of the court below is based on Section 1332, New Title 28 U. S. C. Plaintiff¹ is a citizen of California and defendant a citizen of Delaware, and the amount in controversy exceeds \$3,000 [R. 3]. Appeal to this court is from a judgment, entered upon the verdict of a jury, in favor of the plaintiff and against the defendant [R. 74-75] for the sum of \$55,162.42 and costs.

¹Plaintiff has also appealed from the judgment, and in order to avoid confusion, the parties are designated in this brief as in the complaint.

Statement of the Case.

Plaintiff is a motion picture actress and defendant is engaged in the production of motion pictures. On April 29, 1949, plaintiff and defendant entered into a written contract² wherein defendant employed plaintiff to render her services as an actress to portray the leading female role in a photoplay entitled "CARRIAGE ENTRANCE." Plaintiff sued to recover damages for breach of the contract of employment, claiming that the contract was terminated by defendant without justification.

The controversy between the parties arose from the provision of the contract that plaintiff should not be required to render any services pursuant thereto unless and until plaintiff had approved the actor who would portray the leading male role in the picture. Plaintiff on April 29, 1949, approved Robert Young to portray such role, but in her letter of approval agreed that defendant need not assign Young to the role but that any other individual proposed by the defendant should be subject to her approval as set forth in the employment agreement. This letter is set forth in full hereinafter. Young, at the time, was under a contract of employment which obligated him to perform his services in one picture for defendant, but gave him the right to approve or disapprove any story upon which the picture was to be based.

On July 11, 1949, the script for the photoplay "CARRIAGE ENTRANCE" was submitted to Young and he disapproved the story on which the picture was based and

²Pursuant to stipulation of the parties and the order of this court, the contract is omitted from the printed record but the portions thereof relevant to this appeal are printed in an appendix to this brief.

refused to perform the leading role. Thereafter defendant proposed to plaintiff a number of motion picture actors to portray the leading male role in the picture, but plaintiff refused to approve any of the actors so proposed, and on August 17, 1949, defendant terminated the employment contract. Defendant claims it proposed the names of actors of recognized standing and ability and endeavored, in good faith, to secure the approval of plaintiff of anyone of at least five different actors, and because of the refusal of plaintiff to approve any one of such actors for the leading male role, was justified in terminating the contract. Plaintiff, on the other hand, claimed that termination of the contract was wrongful and without cause, was taken in bad faith, and constituted a breach of contract.

The questions involved in the appeal of defendant all arise from the charge of the court to the jury or from the refusal of the court to give instructions tendered by the defendant. Exceptions to the instructions given and to the refusal to instruct as requested by defendant are set forth in full hereinafter. It is our contention that in its charge the court departed completely from the issues as made by the pleadings and to which practically all of the evidence in the case was addressed, erroneously instructed, or omitted to instruct, the jury as to the legal effect and proper interpretation of the contract, gave the jury inconsistent and misleading instructions and invaded the province of the jury by the instructions as to the facts.

Detailed references to the record are contained in the argument. Briefly, it is the position of defendant, that under the contract between the parties, the parties were not bound to perform thereunder unless and until plaintiff approved an actor proposed by defendant to play the leading male role, that it was the duty of defendant, after

Robert Young refused the role, to propose to plaintiff in good faith the names of qualified actors for the part, and the duty of the plaintiff to accept or reject such proposal or proposals in good faith; that if defendant, in good faith, proposed the name of a qualified actor, and if plaintiff, for any reason advanced in good faith refused to approve such actor, neither party was further bound under the contract, and defendant was justified in terminating the contract and incurred no liability to plaintiff upon so doing. The court not only refused to give instructions tendered by defendant in support of this theory of the case, but affirmatively instructed, that by her approval of Robert Young plaintiff became obligated to perform the contract, and if she rendered any services thereafter, the jury should bring in a verdict for the plaintiff.

Specifications of Errors Relied Upon.

Defendant assigns the giving of the following instructions to the jury as error:

1. “(COURT’S INSTRUCTION A).

“The plaintiff, Ann Sheridan, is a motion picture actress and the defendant, RKO Radio Pictures, Inc., is a corporation engaged in the production and distribution of motion pictures. According to the undisputed testimony defendant, RKO, took over from Polan Banks what was termed a ‘package deal.’ This included the story and script for ‘CARRIAGE ENTRANCE,’ the producer, Banks, the artist for the leading female role, Ann Sheridan, and the actor for the male leading role, Robert Young. RKO took over this package deal in settlement (687) of litigation between itself and Polan Banks. On April 29, 1949, the plaintiff and the defendant entered into the con-

tract which has been received in evidence as Exhibit No. 1, under which the plaintiff agreed to render her services as an actress in the leading female role in a motion picture to be produced by the defendant entitled 'CARRIAGE ENTRANCE' and defendant agreed to employ plaintiff as such actress. The plaintiff was not required to render any services pursuant to the contract unless and until she had approved:

"(a) The final shooting script of the screen play for 'CARRIAGE ENTRANCE.'

"(b) The director who would direct 'CARRIAGE ENTRANCE.'

(c) The actor who would portray the leading male role in 'CARRIAGE ENTRANCE.'

"There is no dispute between the parties with respect to the approval by the plaintiff of the final shooting script of the screen play for 'CARRIAGE ENTRANCE' or the director who would direct the picture. This action presents the question as to whether plaintiff, prior to the termination of her employment by defendant, after approving Robert Young as an actor to portray the leading male role, rendered services to defendant RKO; questions as to the good faith of the respective parties in their dealings concerning the actor for said leading male role after Young's refusal of the part; and the questions presented by defendant's (688) Counter-claim." [R. 587-588.]

Such instruction was excepted to upon the following grounds:

"(1) The court's instruction A, upon the ground that it states an erroneous legal proposition, and upon the ground that the contract of April 29, 1949, Plaintiff's Exhibit 1, provides that the artist, plaintiff, shall not be required to render any services pursuant to

the contract unless and until she has approved the actor who will portray the (669) leading male role in 'CARRIAGE ENTRANCE,' and that plaintiff never approved the actor who would portray said leading male role, in that the written approval of Robert Young was qualified by the condition that defendant need not assign him to portray the leading male role in the picture, and that any other individual proposed by defendant to portray the leading male role in the picture should be subject to the approval by plaintiff as provided in Article 1 of said agreement; that Robert Young refused to portray the leading male role in the picture and did not portray said role, or ever become the person who would portray said role; that instruction A assumes that Robert Young was approved as a person who would portray the said role and is contrary to the fact; that, in fact, plaintiff never approved any other actor who would portray the leading male role in the picture, and the instruction assumes a fact that is contrary to the evidence. And upon the ground that the plaintiff never became obligated to nor rendered services pursuant to the contract." [R. 570-71.]

2. "(COURT'S INSTRUCTION B).

"On the same day that the contract was entered into, April 29, 1949, plaintiff in writing, Exhibit No. 2, approved Robert Young to portray the leading male role in the picture. This writing was drawn by defendant and also provides that defendant need not assign Robert Young to the picture but that any other individual proposed by defendant to portray the role should be subject to the approval of plaintiff as set forth in the employment contract. Robert Young was, on April 29, 1949, required under a written contract with defendant to render his services in

one motion picture to be produced by defendant and based upon a story which should be approved by Robert Young. The defendant submitted the screen play for 'CARRIAGE ENTRANCE' to Robert Young about July 7th, 1949, and Young refused on July 11, 1949, to approve such screen play or to render his services in portraying the leading male role in the motion picture. Accordingly, you are instructed that after approval by plaintiff of Robert Young, and after plaintiff did obligate herself on April 29, 1949, to render her services in the picture, nevertheless, Young's refusal on July 11th, 1949, to perform the part, made it necessary for the parties to again agree on an actor for the leading male role, before production could start on the picture." [R. 588-589.]

Such instruction was excepted to upon the following grounds:

"(2) Court's instruction B, upon all of the grounds assigned for the objection to court's instruction A, and upon the ground that said instruction assumes that plaintiff did obligate herself to render services under the contract by her approval of Robert Young on April 29, 1949." [R. 571.]

3. "(COURT'S INSTRUCTION G).

"The case therefore breaks itself down into three parts:

"(1) Issues arising under paragraph 29 of the contract.

"(2) The general question of the good faith of plaintiff and defendant in their dealings, one with the other in connection with the approval of an actor for the leading male role, and

"(3) The issues presented by the counter-claim." [R. 591.]

Such instruction was excepted to upon the following grounds:

“(3) Court’s instruction G, upon the ground that the instruction fails to take into consideration that entirely (670) apart from paragraph 29 plaintiff never became obligated to render her services under the contract, because she never approved the actor who would portray the leading male role in ‘CARRIAGE ENTRANCE’ and said instruction does not present this essential part of the case.” [R. 572.]

4. “(COURT’S INSTRUCTION H-1).

“The court instructs you that Ann Sheridan, on April 29, 1949, approved Robert Young as the actor for the leading male role in the film play, pursuant to the contract, and that she thereby became bound to render her services to the defendant.

“Since there is no issue to be decided by you as to the approval of the script or the director by the plaintiff, Ann Sheridan, the sole issue which you must decide arising under paragraph 29 of the contract is as follows:

“(1) Did Ann Sheridan render any services to the (692) defendant RKO, pursuant to the contract and prior to its termination on August 17, 1949?

“If you answer this question in the affirmative, then your verdict must be for the plaintiff on her complaint in the sum of \$50,000 plus \$5,162.42 interest.” [R. 592.]

Such instruction was excepted to upon the following grounds:

“(4) Court’s instruction H-1, upon all of the grounds assigned for the objection to court’s instruction A, and upon the further ground that con-

trary to the fact the jury is thereby instructed that plaintiff on April 29, 1949, approved Robert Young as the actor for the leading male role, in the film play, and as the actor who would portray the leading male role in said film play, and that plaintiff by said approval of Robert Young became bound to render services pursuant to the contract. And upon the further ground that the court thereby instructed the jury that the sole issue to be decided by the jury was, Did the plaintiff render any services to defendant pursuant to the contract and prior to termination on August 17, 1949; and instructed the jury that if the answer to such question was in the affirmative the verdict of the jury must be for plaintiff. And upon the ground that the evidence shows that plaintiff rendered no services pursuant to the contract prior to the refusal of Robert Young to portray the leading male role in the picture, or at any time thereafter. And upon the further ground that the jury is thereby instructed that if plaintiff rendered (671) any services pursuant to the contract subsequent to April 29, 1949, and prior to August 17, 1949, plaintiff is entitled to recover without regard to whether plaintiff ever approved any actor who would portray the leading male role after Robert Young refused to perform said role, and that such instruction is erroneous under the law and contrary to the provisions of the contract.” [R. 572-73.]

5. “(COURT’S INSTRUCTION J-1).

“If your answer to the foregoing question is in the affirmative and you arrive at a verdict for the plaintiff, then you need consider no further issues in this case.

“If your answer to the foregoing question is in the negative and you do not arrive at your verdict, then

you must consider the second phase of the case, namely, the question of the good faith of the parties in their dealings one with the other, in attempting to arrive at an agreement on an actor to play the leading male role in place of Robert Young." [R. 592-93.]

Such instruction was excepted to upon the following grounds:

"(5) Court's instruction J-1, upon all the grounds assigned for the objection to court's instruction A, and upon all of the grounds assigned for the objection to court's instruction H-1." [R. 573.]

6. "(COURT'S INSTRUCTION L).

"After Robert Young refused to play the leading male role, it became necessary for the plaintiff, Ann Sheridan, and the defendant, RKO, to agree on a new male lead before the production could continue.

"The procedure contemplated by the contract, Exhibit No. 1, and the letter, Exhibit No. 2, which defendant prepared for Miss Sheridan's signature, was as follows:

"That if Young was not used by the defendant in the film play, then RKO would propose an actor for the leading male role and Miss Sheridan could then approve or reject this actor. Under the agreement between the parties she had the right to approve or reject the proposed actor.

"In substance, this amounted to simply this: That Ann Sheridan and RKO, under the agreement, had to come to an agreement or a meeting of the minds on the actor for the leading male role.

"The plaintiff had no right or voice in the selection of an actor to portray the leading male role in

the picture. She could only approve or disapprove any actor selected by the defendant. The matter of selection of an actor for the role was exclusively the right of defendant and the defendant fully complied with its obligation under the contract if it proposed, in good faith, to assign to the role a competent (694) and qualified actor of recognized standing and reputation in the motion picture industry and one suited for the leading male role in the picture. It is not material that defendant did not actually assign any actor to portray the leading male if the the plaintiff by her statements or conduct plainly indicated that she would not approve such actor if he were assigned to the role." [R. 593-94.]

Such instruction was excepted to upon the following grounds:

"(6) Court's instruction L, upon the ground that said instruction fails to state that if in good faith defendant proposed an actor to portray the leading male role in the picture, and the plaintiff failed to approve said actor after reasonable opportunity so to do, plaintiff never became obligated to render her services pursuant to the contract and could not recover in the action." [R. 573.]

7. "(COURT'S INSTRUCTION P).

"If you find that Miss Sheridan in her dealings with RKO on this matter of filling the male lead was motivated by and acted in bad faith, then your verdict must be against Miss Sheridan on her complaint and must be a verdict that she take nothing by her complaint, unless you find that she is entitled to your verdict under my previous instructions." [R. 595.]

Such instruction was excepted to upon the following grounds:

“(7) Court’s instruction P, upon all of the grounds assigned for the objection to court’s instruction A, and upon all of the grounds assigned for the objection to court’s instruction H-1.” [R. 573.]

8. “(COURT’S INSTRUCTION Q).

“If you find that both parties in their dealings concerning the filling of the leading male role, were motivated by and were acting in good faith in such dealings, then your verdict must be against Miss Sheridan on her complaint and must provide that she take nothing by that complaint unless she is entitled to recover under my previous instructions.

“When I talk about ‘my previous instructions’ I am talking about the instructions concerning section 29 of the contract.” [R. 595-96.]

Such instruction was excepted to upon the following grounds:

“(8) Court’s instruction Q, upon all of the grounds assigned for the objection to court’s instruction A, and court’s instruction H-1 (672).” [R. 573.]

Defendant also assigns as error the refusal of the court to give the following instructions requested by defendant:

9. “Instruction No. 1. Requested by Defendant, RKO Radio Pictures, Inc.

“The plaintiff, Ann Sheridan, is a motion picture actress, and the defendant, RKO Radio Pictures, Inc., is a corporation engaged in the production and distribution of motion pictures. On April 29, 1949, the

plaintiff and defendant entered into the contract which has been received in evidence under which the plaintiff agreed to render her services as an actress in the leading female role in a motion picture to be produced by the defendant entitled 'Carriage Entrance' and defendant agreed to employ plaintiff as such actress. The plaintiff was not required to render any services pursuant to the contract unless and until she had approved

"(a) The final shooting script of the screen play for 'Carriage Entrance.'

"(b) The director who would direct 'Carriage Entrance.'

"(c) The actor who would portray the leading male role in 'Carriage Entrance.'

"There is no dispute between the parties with respect to the approval by the plaintiff of the final shooting script of the screen play for 'Carriage Entrance' or the director who would direct the picture. This action arises from the failure of plaintiff, prior to the termination of her employment by defendant, to approve an actor to portray the leading male role." [R. 57-58.]

Defendant excepted to the refusal of the court to give said instruction on the following ground:

"Defendant's proposed instruction No. 1, upon the ground that the court failed to instruct the jury that the plaintiff prior to the termination of her employment failed to approve an actor to portray the leading male role in the picture, but on the contrary instructed the jury that the plaintiff had approved Robert Young for such role and thereby became obligated to render her services pursuant to the contract, and that such an instruction embodies an er-

roneous conclusion of law and an erroneous interpretation and construction of the terms of the agreement between the parties.” [R. 574.]

10. “Instruction No. 2. Requested by Defendant, RKO Radio Pictures, Inc.

“On the same day that the contract was entered into, plaintiff in writing approved Robert Young to portray the leading male role in the picture. This writing provides that defendant need not assign Robert Young to the picture but that any other individual proposed by defendant to portray the role should be subject to the approval of plaintiff as set forth in the employment contract. Robert Young was, on April 29, 1949, required under a written contract with defendant to render his services in one motion picture to be produced by defendant and based upon a story which should be approved by Robert Young. The defendant submitted the screen play for ‘Carriage Entrance’ to Robert Young and Young refused to approve such screen play or to render his services in portraying the leading male role in the motion picture. Accordingly, you are instructed that the approval by plaintiff of Robert Young did not obligate her to render her services in the picture and made it necessary that defendant should propose to plaintiff some other person to play such role, and that plaintiff should approve such person before she became bound to render her services.” [R. 58-59.]

Defendant excepted to the refusal of the court to give said instruction on the following ground:

“10. Defendant’s requested instruction 2, on the ground that under the terms of the contract the ap-

proval by plaintiff of Robert Young on April 29th was not and did not obligate plaintiff to render her services under the contract.” [R. 574.]

11. “Instruction No. 5. Requested by Defendant, RKO Radio Pictures, Inc.

“The contract between the plaintiff and the defendant provides that if because the plaintiff does not approve an actor to portray the leading male role in the picture the plaintiff does not become obligated to and does not render any services pursuant to the contract, the defendant shall not be required to pay any compensation to the plaintiff. Therefore, if the defendant did, in good faith, propose any actor to portray such role and plaintiff did not approve such action, defendant was entitled to terminate the contract of employment without paying any compensation to plaintiff.” [R. 61.]

Defendant excepted to the refusal of the court to give said instruction on the following ground:

“(11) Defendant’s instruction 5, upon the ground that said instruction is a correct statement of the law, material to the consideration of the issues of fact, and is not covered by any instruction given by the court.” [R. 574.]

12. “Instruction No. 6. Requested by Defendant, RKO Radio Pictures, Inc.

“The contract between the plaintiff and the defendant provides that if the plaintiff does not approve

an actor to portray the leading male role in the picture, the plaintiff does not become obligated to render any services pursuant to the contract. Therefore, if the defendant did in good faith propose any actor to portray such role and plaintiff did not approve such actor, the plaintiff never became obligated to render any services pursuant to the contract.” [R. 62.]

Defendant excepted to the refusal of the court to give said instruction on the same ground as it excepted to the refusal of the court to give instruction No. 5.

13. “Instruction No. 7. Requested by Defendant, RKO Radio Pictures, Inc.

“If you find that the defendant did in good faith propose any actor to portray the leading male role in the picture and plaintiff did not approve such actor, the plaintiff never became obligated to render any services pursuant to the contract. Therefore, any services she might have performed could not have been pursuant to the contract and the plaintiff is not entitled to be compensated for them.” [R. 62.]

Defendant excepted to the refusal of the court to give said instruction on the same ground as it excepted to the refusal of the court to give instruction No. 5 [R. 575].

14. “Instruction No. 8. Requested by Defendant, RKO Radio Pictures, Inc.

“Defendant was under no obligation to propose more than one actor for the leading male role in the

picture if such actor was, in the honest judgment of the defendant, qualified for the performance of such role. Having proposed such an actor, defendant was entitled to insist that plaintiff either approve or disapprove such selection by defendant, and if plaintiff disapproved such proposal, defendant might have terminated the contract of employment of plaintiff without incurring any liability to plaintiff." [R. 63.]

Defendant excepted to the refusal of the court to give said instruction on the same ground as it excepted to the refusal of the court to give instruction No. 5 [R. 575].

Summary of Argument.

Under the express terms of the contract plaintiff did not become obligated to render services unless and until she approved the actor who would portray the leading male role in the picture, and unless and until she first gave such approval did not become entitled to recover any compensation. The contract required good faith in the proposal by defendant of individuals for the role and in the exercise by plaintiff of the right of approval of the individuals proposed. If, after a good faith endeavor, the parties were unable to reach agreement, neither party was bound to perform and plaintiff could not recover.

The approval by plaintiff of Robert Young for the leading role expressly recognized the right of defendant not to appoint him, and reserved to plaintiff the right

of approval of any other person who might be proposed by defendant in his place. When Young refused to perform his services in the picture, other persons were proposed by defendant and approval thereof refused by plaintiff. The only issue for the jury to determine was whether defendant had acted in good faith in proposing these individuals and was justified in terminating the contract because of plaintiff's refusal to approve any of the persons proposed.

The court instructed the jury erroneously that the approval of Young for the leading male role by the letter of April 29, 1949, obligated plaintiff to perform services pursuant to the contract and left no question for the jury except whether plaintiff performed any services. In contradictory and inconsistent instruction, however, the court told the jury that after Young refused the role it was necessary for the parties to agree on an actor for the leading role before production could start on the picture. The court refused to give any instructions tendered by defendant setting forth its theory of the defense—namely, first, that because plaintiff never approved the actor who would portray the leading role she never became obligated to render any services and that in such event plaintiff was entitled to no compensation; and second, that defendant had diligently and in good faith sought the approval of actors capable and qualified for the role, and because of the refusal of plaintiff to approve any of said persons, was justified in terminating the contract.

ARGUMENT.

I.

The Terms of the Contract Made Approval by the Plaintiff of the Actor for the Leading Male Role a Condition Precedent to Any Obligation on the Part of Plaintiff to Perform or Any Liability on the Part of Defendant to Compensate Plaintiff.

In an appendix to this brief there is set forth the provisions of the contract which are material to a consideration of this appeal. The plaintiff in the contract is designed as "Artist" and defendant as "Producer."

Paragraph 1 specifies:

"Artist shall not, however, be required to render any services pursuant hereto unless and until she has approved each and all of the following:

- (a) The final shooting script of the screenplay for CARRIAGE ENTRANCE;
- (b) The director who will direct CARRIAGE ENTRANCE; and
- (c) The actor who will portray the leading male role in CARRIAGE ENTRANCE."

Paragraph 4 provides that the plaintiff's employment shall start on such date as is specified by the defendant in writing not earlier than June 1, 1949, and not later than July 6, 1949, and shall continue after the starting date until the plaintiff has completed all of her services in connection with the principal photography of "CARRIAGE ENTRANCE."

Paragraph 6 provides that "On condition that Artist fully performs all of her obligations hereunder, and as payment in full for Artist's services during the first

fifteen weeks of the term hereof . . . the producer agrees to pay" \$150,000.00, \$100,000.00 of which shall be deferred and payable only from the gross receipts of the picture, and \$50,000.00 of which shall be paid on the first regular weekly payday after principal photography of "CARRIAGE ENTRANCE" is commenced.

The right of termination is given the defendant by paragraph 21 in the event that the plaintiff should fail, refuse or neglect to perform any of her obligations under the contract.

Paragraph 29 reads as follows:

"Producer shall not be required to use Artist's services hereunder or to complete the production of CARRIAGE ENTRANCE, and shall be deemed to have fully performed all its obligations to Artists by paying Artist the minimum compensation payable to Artist hereunder. However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder."

At the time of the execution of the contract the plaintiff signed and delivered to the defendant the following letter:

"Gentlemen:

"Please refer to the agreement between us dated April 29, 1949, relating to my employment by you in connection with your motion picture now entitled 'Carriage Entrance,' which agreement is being entered into concurrently herewith.

"This will confirm that I have approved and hereby approve any of the following individuals to act as the director of 'Carriage Entrance':

"John Cromwell,

"Robert Stevenson,

"H. C. Potter.

"You shall not be obligated to assign any of these individuals to direct the Picture, but any other individuals proposed by you to direct the Picture shall be subject to my approval, as set forth in Article 1 of said employment agreement.

"This will also confirm that I have approved and hereby approve Robert Young to portray the leading male role in 'Carriage Entrance.' You shall not be obligated to assign him to portray the leading male role in the Picture, but any other individual proposed by you to portray the leading made role in the Picture shall be subject to my approval, as set forth in Article 1 of said employment agreement.

"Dated April 29, 1949.

"Yours very truly,

"Ann Sheridan."

[Pltf. Ex. 2; R. 90-91.]

Young was obligated to perform his services as a motion picture actor in one picture for the defendant, but the contract gave Young the right to refuse to appear in any story of which he did not approve [Deft. Ex. C; R. 477]. On July 7, 1949, the defendant submitted to Young a screen play based upon the novel "CARRIAGE ENTRANCE" advising Young that the screen play was being submitted to him for his approval as provided in his contract [R. 473]. On July 11, 1949, Young acknowledged receipt of the screen play and notified the defendant that he

was rejecting and disapproving the submitted story [R. 475]. Commencing immediately after the rejection of the role by Young, the parties endeavored to arrive at a substitute for the leading male role in the picture.

Plaintiff visited the studio on June 16 for the first time after the contract was signed on April 29, and this for the purpose of attending a luncheon for her on that date [R. 91]. Sometime between July 5 and July 7 she again went to the studio for a conference about the script, a copy of which had been received and read by plaintiff prior to that date [R. 91-92]. At this conference³ she was told that Young had refused the part [R. 93] and discussions started as to a possible replacement for Young [R. 94]. Sometime after the 11th of July plaintiff again went to the studio and was shown some film in which Mel Ferrer and Robert Ryan appeared for the purpose of persuading her that such actors or either of them was suitable for the part [R. 96-97]. There were further discussions on a date between the 11th of July and July 14 [R. 99], between the 14th and 16th of the month [R. 100], and on dates which the plaintiff fixed as on or about July 20, July 22 and July 25. All of these consultations or conferences were held after it was known that Young would not play the role and for the purpose of arriving at an agreement on some actor that defendant was willing to propose for the role and plaintiff was willing to approve.

The defendant had employed the dress designer chosen by plaintiff, and prior to July 27 plaintiff had checked with him on designs for costumes she was to wear in

³Since Young did not refuse the part until July 11, it is apparent that the witness is mistaken as to the date of this meeting.

the picture, and on July 27 she went to the studio for costume fittings [R. 121] which defendant at large expense was having designed and made to be worn by plaintiff in the picture. Plaintiff was in the hospital for a check and rest for about one week and returned to the studio for the next conference on August 11 [R. 123]. At that time Rogell, the executive producer for defendant proposed to plaintiff the names of Mel Ferrer, Robert Ryan, Robert Preston, Richard Basehart and Van Heflin, and plaintiff refused to approve any of such persons [R. 123-124]. On August 15 Rogell arranged a meeting between Howard Hughes, who was the official of defendant having the final authority in the selection of the stars for the picture, and plaintiff and Hughes again tried to persuade plaintiff to approve one of the actors proposed by defendant but without success. Plaintiff did agree to look at more film of Robert Preston, Mel Ferrer, Robert Ryan and Van Heflin [R. 125-128] the next day, August 16, and saw different pictures in which Ryan, Ferrer, Preston and Heflin had appeared, but she still refused her approval [R. 128-129].

All the above references to the record are to the testimony of plaintiff, but the greater part of the record relates to the discussions and consultations between the parties relative to the selection of an actor for the leading male role in the picture. It is not necessary to discuss this evidence in detail, but we think it may be fairly summarized by stating that the parties were practically in continuous consultation respecting the selection of a leading male actor from the time it became known, July 11, that Young would not play the role, until the contract was terminated by the defendant on August 17, 1949. In the course of these conferences and discussions the de-

fendant proposed for the role persons named above, all of whom we think it must be conceded were motion picture actors of recognized standing and ability, although according to the opinion of plaintiff not suitable for the lead in this particular picture. Irrespective of the differing views of the parties respecting the suitability of these actors, the continuous and protracted efforts of defendant to secure the approval of plaintiff indicates very convincingly a good faith attempt to reach an agreement on this matter and get the picture into production with the plaintiff as the female star.

The plaintiff, on her part, made suggestions to the defendant of individuals whom she would approve for the role, but none of these were satisfactory to the defendant and no person to portray the leading male role in the picture proposed by the defendant was ever approved by the plaintiff. On August 17, 1949, the defendant, feeling that it had made every reasonable effort to secure the approval of the plaintiff to an actor for the role, terminated the contract. Subsequently a picture based upon the story was produced with a person other than the plaintiff in the leading female role.

It should be pointed out, in connection with these consultations and conferences, as the court in fact instructed the jury:

“The plaintiff had no right or voice in the selection of an actor to portray the leading male role in the picture. She could only approve or disapprove any actor selected by the defendant. The matter of selection of an actor for the role was exclusively the right of defendant and the defendant fully complied with its obligation under the contract if it proposed, in good faith, to assign to the role a competent and qualified actor of recognized standing and reputation

in the motion picture industry and one suited for the leading male role in the picture. It is not material that defendant did not actually assign any actor to portray the leading male if the plaintiff by her statements or conduct plainly indicated that she would not approve such actor if he were assigned to the role." [R. 594.]

Likewise that:

"It is not important how or in what manner names of actors for this role were proposed or what formality was used. RKO would not need to make a formal proposal in writing or otherwise, as to the name of an actor which Miss Sheridan had orally rejected. The law does not require the doing of an idle act."

These instructions were, of course, completely ineffective because the other instructions took the matter covered by these instructions completely out of the hands of the jury.

The provision of the contract that plaintiff should not be obligated to render any services unless and until she had approved an actor to portray the leading male role, and paragraph 29 stating that defendant should not be required to pay plaintiff any compensation in the event she did not so approve, established a condition upon the performance of which depended the right of plaintiff to recover any compensation. It is elementary that where a right is made to depend on the occurrence of a future event and, through no fault of the promissor the event does not occur, there can be no recovery on the promise.

Van Orden v. Metson, 75 Cal. App. 2d 595;

Cantwell v. Gage, 111 Cal. App. 209;

Lynch v. Keystone Consol. Mng. Co., 163 Cal. 690.

II.

The Obligation of Each of the Parties Was the Exercise of Good Faith in Reaching Agreement on the Selection of an Actor for the Leading Male Role.

While the bare language of the contract made the failure of the defendant to approve the leading actor a complete excuse for nonpayment of any compensation to plaintiff, defendant has always recognized that in this, as in every contract, there is an implied covenant of good faith.

Universal Sales Corp. v. Calif. Press Mfg. Co.,
20 Cal. 2d 751;

Nelson v. Isaac Abrahams, 29 Cal. 2d 745.

The clause of the contract relieving plaintiff of any obligation to render services unless and until she approved an actor for the leading male role is, on its face, one for her benefit and protection. Had plaintiff agreed to perform her services with any actor that defendant might select, there could never have been any controversy between the parties and this litigation would not have resulted. The controversy arose entirely from the insistence of plaintiff that she should have the final say as to any actor defendant proposed for the role—a right which plaintiff demanded despite the fact that it would seem reasonably certain that since defendant was investing more than a million dollars in the picture, it would select no actor who was not clearly competent and qualified. Defendant could hope to recoup this large

expenditure—to say nothing of making any profit as to which it had a 90% interest as against the 10% interest of the plaintiff—only if the “stars” of the picture had sufficient standing and public appeal to induce attendance at the theatre.

The requirement of good faith was mutual. Defendant’s duty was to propose an actor of standing and ability, recognized as such in the profession and suitable for the role to be portrayed. Plaintiff was required to approve or reject such proposals on the basis of an honest estimate of the actors proposed. If both so proceeded, the failure to reach agreement subjected neither to any liability. If either failed to so proceed, the implied covenant was breached and a right of action arose.

In this connection, as we have already observed, the selection of an actor was the right and duty of the defendant. Plaintiff could only approve or disapprove. Plaintiff had no right to select or propose an actor but only to pass judgment on those selected or proposed by defendant.

III.

The Court Should Have Instructed the Jury That the Issues to Be Determined by It Was Whether Good Faith Had Been Exercised by the Respective Parties in Attempting to Reach an Agreement on the Actor for the Leading Male Role in the Picture and Whether the Defendant Was Justified in Terminating the Contract as and When It Did.

The issues made by the pleadings revolved around the acts and offers of the parties with respect to the selection of an actor for the leading role in the picture. Thus the complaint alleges the proposal of certain available actors by plaintiff [R. 6]; the refusal of defendant to appoint any of such persons [R. 7-8]; the willingness to and actual cooperation of plaintiff in selecting an actor [R. 8]; and the termination of the contract by defendant arbitrarily without cause and in bad faith [R. 8-9]. The defense is specifically pleaded in paragraphs IV and V [R. 26-27] of the further and additional defense of the answer. These allegations, in brief, are that after Young refused to portray the role, defendant in an honest and good faith endeavor to secure the approval of plaintiff to a leading actor in order to complete the production of the picture and utilize the services of plaintiff, proposed qualified, talented, experienced and capable actors, and that plaintiff unreasonably and without justification refused to approve any person so proposed, and because of such refusal defendant terminated the contract. The court, we submit, should in appropriate language have instructed the jury that it would determine whether defendant had acted in good faith in proposing to plaintiff the names of actors, and if so whether because of the continued and repeated refusal of plaintiff to approve any of such actors defendant was justified in terminating the contract as and when it did.

The record discloses that practically all of the evidence offered by the parties was responsive to these issues made by the pleadings. A reading of the record will disclose that plaintiff addressed her evidence to the proposition that she had cooperated fully with the defendant in an endeavor to agree upon a suitable actor; that she had made suggestions in this respect to the defendant all of which were rejected by defendant; that the actors proposed by defendant were not proper or qualified for the part; and that the contract was terminated by defendant without the actual assignment of any actor to the role and was not justified. Defendant, on the other hand, attempted to satisfy the jury that it had proposed not one but five actors, all eminently qualified, of recognized standing and ability in the industry; that plaintiff had unequivocally refused to approve any one of such actors; that it would have been idle to assign one of such persons to the role because of such refusal; that it had done everything that could have reasonably been required of it in a good faith endeavor to agree on a leading actor; and that it was justified in assuming that further effort to secure the consent of plaintiff would have been futile and in terminating the contract as and when it did.

The evidence on these issues was conflicting and defendant does not assert that a verdict against it, if these issues had been properly submitted, would have been without support in the evidence. But because the court never properly submitted the real issues to the jury, defendant contends it could not, and did not, secure any determination by the jury of the real issues in the case. The construction which the court placed upon the contract and legal effect which this court accorded the letter of April 29, 1949, were erroneous and made impossible any proper consideration by the jury of the defense which defendant pleaded and offered evidence to sustain.

IV.

The Charge of the Court Was Erroneous Both Because of the Instructions Given and the Refusal to Instruct as Requested by the Defendant.

The court refused to give any instruction proposed by plaintiff except Plaintiff's Instruction 10 [R. 598] as modified by the court [R. 578]. The court likewise refused to give any instruction requested by defendant except Instruction 4 [R. 60] which the court gave as part of its Instruction L [R. 593]. All of the remaining portions of the charge were prepared by the court.

(A) The Court Was in Error in the Instructions Which It Gave.

The instructions to which defendant objected, and the objections urged thereto are, in compliance with the rules of this court, set out in full in the assignment of errors. We now proceed to point out the particulars in which we believe the instructions were erroneous.

COURT'S INSTRUCTION (A).
[R. 587.]

This instruction the court, after stating generally the situation, concludes as follows:

"This action presents the question as to whether plaintiff, prior to the termination of her employment by defendant, after approving Robert Young as an actor to portray the leading male role, rendered services to defendant RKO; questions as to the good faith of the respective parties in their dealings concerning the actor for said leading male role after Young's refusal of the part; and the questions presented by defendant's Counter-Claim." [R. 588.]

This instruction is misleading for the reason that it contains the plain implication that the approval by plaintiff of Robert Young was absolute and that thereby she became bound to render services pursuant to the contract. The court should have advised the jury that under the terms of the contract and the letter of April 29, 1949, RKO was not obligated to assign Young for the role, and that any other person who was assigned must be approved by the plaintiff before she was bound to perform her services. It was and is the position of the defendant that the court should at all times have made plain to the jury that the approval of Robert Young on April 29, 1949, was only conditional and did not and would not obligate her to perform any services except that Young agreed to perform the role. The court should have told the jury that the plaintiff never became bound to render services pursuant to the contract, because of the refusal of Young and the failure of plaintiff to approve an actor for the role, and the jury was to determine whether this situation resulted from the fault of plaintiff or of the defendant.

COURT'S INSTRUCTION (B).

[R. 588.]

This instruction sets forth generally the contents of the letter of April 29, 1949 [Pltf. Ex. 2, R. 90], and the fact that Young was not required to render his services in the picture and that on July 11, 1949, Young refused to render such services, and then concludes:

“Accordingly, you are instructed that after approval by plaintiff of Robert Young, and after plaintiff did obligate herself on April 29, 1949, to render

her services in the picture, nevertheless, Young's refusal on July 11th, 1949, to perform the part, made it necessary for the parties to again agree on an actor for the leading male role, before production could start on the picture." [R. 589.]

Here the jury is told plainly that by the letter of April 29, 1949, the plaintiff obligated herself to render her services in the picture and this, we submit, is not the legal effect of the qualified approval given by plaintiff in the said letter. The instruction is inconsistent within itself, because while the jury is told that plaintiff's approval obligated her to render her services in the picture, the court proceeds to advise the jury that after Young's refusal to perform the part it was necessary for the parties to again agree on an actor for the leading male role "before production could start on the picture." If production could start on the picture only after plaintiff had agreed on an actor for the leading male role, certainly plaintiff was not bound to render services until this agreement was reached. Otherwise a situation would be presented where the plaintiff was bound to render services, but such services could never be rendered because production could not start on the picture. The court should have told the jury that after Young refused to perform it was necessary that the defendant should propose and the plaintiff should approve some actor before the plaintiff was obligated to render any services under the contract.

The court, in this instruction, uses the phrase "before production could start on the picture", but in truth and in fact the selection of the leading male actor in the manner provided in the contract was essential to the existence of any obligation on the part of plaintiff to render her services, or defendant to compensate her. In other words,

if it was admitted that defendant had selected a competent, qualified actor for the role, exercising good faith in such selection, and had assigned such actor to the role and the plaintiff, honestly feeling that the actor selected was not adequate or suitable for the part, refused her approval, neither party would have been under any liability nor would have had any right or remedy as against the other.

COURT'S INSTRUCTION (G).
[R. 591.]

This instruction reads as follows:

“The case therefore breaks itself down into three parts:

“(1) Issues arising under paragraph 29 of the contract.

“(2) The general question of the good faith of plaintiff and defendant in their dealings, one with the other in connection with the approval of an actor for the leading male role, and

“(3) The issues presented by the counter-claim.”

The objection to this instruction is that it fails to take into consideration, that entirely apart from paragraph 29 of the contract, plaintiff under paragraph 1 of the contract and the letter of April 29, never became obligated to render her services under the contract because she never approved the actor who would portray the leading male role in the picture, and the instruction does not present this essential part of the case. Paragraph 29 of the contract is merely complimentary to paragraph 1, the latter providing that plaintiff shall not be bound to render her

services until she approves the actor who will portray the leading male role, and paragraph 29 releasing the defendant from the obligation to pay plaintiff any compensation until she has approved such actor.

COURT'S INSTRUCTION H-1.

[R. 592.]

"The court instructs you that Ann Sheridan, on April 29, 1949, approved Robert Young as the actor for the leading male role in the film play, pursuant to the contract, and that she thereby became bound to render her services to the defendant.

"Since there is no issue to be decided by you as to the approval of the script or the director by the plaintiff, Ann Sheridan, the sole issue which you must decide arising under paragraph 29 of the contract is as follows:

"(1) Did Ann Sheridan render any services to the defendant RKO, pursuant to the contract and prior to its termination on August 17, 1949?

"If you answer this question in the affirmative, then your verdict must be for the plaintiff on her complaint in the sum of \$50,000 plus \$5,162.42 interest."

The jury is here expressly told that when the plaintiff approved Young by the letter of April 29, 1949, she became bound to render her services to the defendant, and that the sole issue which remained for consideration by the jury was whether plaintiff had rendered any services to the defendant pursuant to the contract and if so, the jury must return a verdict for the plaintiff.

This is a formula instruction. Concerning such instructions the courts have said that an instruction which

includes a formula may be justified only if it contains all of the elements essential to a recovery.

Mazzota v. L. A. Ry., 25 Cal. 2d 165;

LaRue v. Powell, 5 Cal. App. 2d 439;

Keller v. Pac. Tel. & Tel. Co., 2 Cal. App. 2d 513;

Sinan v. A. T. & S. F. Ry. Co., 103 Cal. App. 703.

The omission of any one of the essential elements may not be compensated for or cured by the fact that other instructions state the omitted factors required to sustain the verdict directed.

Mazzota v. L. A. Ry. (*supra*);

La Rue v. Powell (*supra*).

The rule is that:

“Where an instruction directs a verdict for plaintiff, if the jury finds certain facts to be true, it must embrace all of the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion that plaintiff is entitled to a verdict.”

Starr v. L. A. Ry. Co., 187 Cal. 270, p. 278.

“It is clear that an instruction directing a verdict for plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein, that plaintiff is entitled to a verdict, and such is the rule in this state.”

Pierce v. United Gas and Electric Co., 161 Cal. 176, 184.

“Formula instructions should not be given. As said in *Tice v. Pacific Elec. Ry. Co.*, 36 C. A. (2d) 66, 71, formula instructions ‘are not calculated best to

serve most successfully the administration of justice. Their final disappearance will improve the conduct of court trials.' While the giving of formula instructions is not in itself prejudicial error, the giving of them here, added to the other circumstances of the case, combined to deny the plaintiff a fair trial."

Taha v. Finegold, 81 Cal. App. 2d 536, 543.

"The province of the jury is invaded where an instruction assumes the existence of a fact which is not in evidence or with respect to which there is a conflict of evidence, and any error in this respect is not, it has been held, cured by other charges which submit to the jury the question whether such fact exists. The rule is not violated, however, by an instruction which merely states the claim of a party, but does not intimate that such claim has been proved, or which opens with the formula 'if you find' certain facts to be true."

24 Cal. Jur. 841, sec. 101;

Ryan v. L. A. I. & C. S. Co., 112 Cal. 244, 254;

Vinther v. Sunset Mutual, etc. Co., 11 Cal. App. 2d 118, 123;

Clark v. Volpa Bros., 51 Cal. App. 2d 173, 179.

"It has frequently been held that instructions of this kind must correctly set forth all the conditions necessary, that the exclusion of any one necessary element constitutes reversible error, and that even a correct instruction in another part of the charge of a matter omitted from the formula instruction, does not rectify the error. (*Beyerle v. Clift*, 59 Cal. App. 7, 9; *Pierce v. United Gas and Electric Co.*, 161 Cal. 176, 184; *Douglas v. Southern Pacific*, 203 Cal. 390, 393.)"

Spear v. Leuenberger, 44 Cal. App. 2d 236, 249.

The court's instruction H-1 plainly violated these rules of law.

The evidence was uncontradicted that both parties to the contract assumed that a replacement for Young would present no great difficulty. Everything that plaintiff did was in contemplation of an agreement between the parties on a leading man, and all of her acts in this respect are detailed in her testimony. She went to a welcome luncheon at the studio on June 16 [R. 91]; she received and read a copy of the script and made some notes on it prior to her visit to the studio in early July and discussed the script at that time with the writer and the author of the book [R. 92-93]: She discussed a possible replacement for Young on this visit and on the subsequent visits about July 11 [R. 96], July 14 [R. 99], July 16 [R. 100], July 20 [R. 114], July 22 [R. 117], and July 25 [R. 118]. On July 27 she went in for costume fittings and prior thereto she stopped at the office of the costume designer and O.K.'d his sketches [R. 121-122]. On some of these occasions she looked at pictures in which the actors under discussion appeared. She made two trips to the studio, one on August 11 [R. 123], and one on August 16 [R. 128] and one to the office of Mr. Hughes on August 15 [R. 125]. On August 11 and August 16, she again looked at pictures and film. Except with respect to reading and discussing the script and approving and fitting costumes, it could hardly be said these things constituted services rendered pursuant to the contract. They were rather steps taken in an effort to reach an agreement that would make it possible to commence to render services pursuant to the contract.

If these activities on the part of the plaintiff constituted a performance of services pursuant to the contract, then

the instruction left nothing for determination by the jury, for these activities of the plaintiff were not only not denied but were testified to by witnesses for the defendant. The court might equally well have directed a verdict for the plaintiff. Whether services of the nature indicated were services "rendered pursuant to the contract," the court nowhere told the jury. Defendant's view is that such services were not rendered within the meaning of the phrase "pursuant to the contract" and could not be so rendered unless and until plaintiff became legally obligated to render services under the contract.

We do not see how there can be any room for doubt that the plaintiff never became obligated to render her services pursuant to the contract of April 29, 1949.

The contract, paragraph 1, recites that plaintiff shall not, however, be required to render any services pursuant hereto *unless and until* she has approved each and all of the following:

- (a) The final shooting script of the screenplay for CARRIAGE ENTRANCE;
- (b) The director who will direct CARRIAGE ENTRANCE; and
- (c) The actor who will portray the leading male role in CARRIAGE ENTRANCE.

The letter of April 29, 1949, states that plaintiff

"has approved and does hereby approve Robert Young to portray the leading male role in 'CARRIAGE ENTRANCE.' You shall not be required to assign him to portray the leading male role in the picture, but any other individual proposed by you to portray the

leading male role in the Picture shall be subject to my approval as set forth in Article 1 of said employment agreement.”

The contract, paragraph 29, says:

“However, if because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to and does not render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder.”

These contractual provisions taken in connection with the undisputed fact that plaintiff never approved any actor to portray the role, leave no room for argument that plaintiff became obligated to render her services to defendant.

As has been pointed out above, the pleadings and the evidence are addressed to the issues as to who was at fault in the failure to agree on an actor to portray the leading male role and as to whether the defendant was justified in terminating the agreement without actually assigning to the role any of the actors proposed to plaintiff without giving plaintiff previous notice of its intended termination of the contract. The court by its instruction H-1 took these issues away from the jury and told the jury, contrary, we contend, to these express contractual provisions, that by the approval of Young by plaintiff on April 29, 1949, she thereby became bound to render her services to defendant, and that the sole issue to be decided by the jury was:

“Did Ann Sheridan render any services to the defendant RKO pursuant to the contract and prior to its termination on August 17, 1949?”

This is a completely false issue. The contract was not terminated because of failure of plaintiff to render services. Plaintiff was not required to render any services unless and until she approved the actor who was assigned by defendant to portray the leading male role, and certainly until that occurred neither party could acquire any rights or incur any obligations pursuant to the contract. The picture could not be produced without an actor for the leading male role. Such actor could be selected by defendant only with the approval of plaintiff. It seems an absurdity to assert that plaintiff became bound to render her services to defendant by her approval of Young when such approval expressly left open and necessary an agreement on the actor to play the leading role.

“It cannot with reason be contended that instructions such as these, so obviously erroneous, and yet so tersely put as to be easily comprehensible to the jury, were not prejudicial, or that the verdict of the jury, in a close case like this, would not be injuriously affected thereby.”

Stein v. Lacassie, 189 Cal. 118, 123.

The instruction was manifestly erroneous in that it directed a verdict for plaintiff if any services were rendered by plaintiff, and completely excluded from consideration by the jury the fact and legal effect of Young's refusal to portray the role, the efforts which were made by the parties to agree upon a substitute, the question of the presence or absence of good faith of each party in those negotiations, and the question of whether defendant was justified in terminating the contract when it did. These matters were the very heart of the case, and the giving of this formula instruction excluded the possibility of the jury giving any consideration to these matters.

COURT'S INSTRUCTION J-1.

[R. 592.]

This instruction embodies in part the only issue presented by the pleadings—namely, the question of the good faith of the parties in attempting to arrive at an agreement on an actor to play the leading male role. We say “in part” because in addition to the question of good faith in attempting to secure an agreement on this matter, the other matter in issue which should have been included in the instruction was the question of whether because of the negotiations with respect to a substitute for Young, the defendant was justified in concluding such negotiations and terminating the contract. By this instruction the jury is told that if its answer to the issues presented by instruction H-1 is in the affirmative, it should not consider further issues in the case, and this makes it clear that the remaining portion of the instruction may as well not have been given. Where it cannot be determined upon what theory the verdict was returned, the instruction must be held to be prejudicial.

Stein v. L. A. Ry. Co., 187 Cal. 270, 280.

COURT'S INSTRUCTION L.

[R. 593.]

This instruction seems to us to embody the real issues between the parties. It is manifest, however, that the jury, having determined that the plaintiff had rendered services, as it must be assumed that it did, was in no way guided or controlled by this instruction. It is not disputed that defendant did not actually assign any actor to play the leading role, but it is equally certain from the evidence that it proposed the names of at least five actors and made it clear to plaintiff that it would assign any one

of such actors to the role if the plaintiff would approve such actor, and the jury should have been permitted to pass on the question as to whether or not the acts and conduct of the plaintiff were such as to plainly indicate that actual assignment would have been an idle act. The instruction is also erroneous because it fails to instruct the jury that if in good faith the defendant proposed an actor to portray the leading male role in the picture and plaintiff failed to approve said actor after reasonable opportunity so to do, plaintiff never became obligated to render her services pursuant to the contract and could not recover in the action.

COURT'S INSTRUCTION P.
[R. 595.]

"If you find that Miss Sheridan in her dealings with RKO on this matter of filling the male lead was motivated by and acted in bad faith, then your verdict must be against Miss Sheridan on her complaint and must be a verdict that she take nothing by her complaint, unless you find that she is entitled to your verdict under my previous instructions."

In this instruction the court told the jury that even though the plaintiff acted in bad faith in the matter of filling the male lead, it could not render a verdict against the plaintiff if it found that the plaintiff had rendered any services prior to the termination of the contract. In other words, the court in effect here says that even though the plaintiff negotiated with the defendant in bad faith and without any expectation or intent of arriving at an agreement on a player for the leading male role, still she was entitled to recover on the basis of its finding that she had rendered services pursuant to the contract prior to

its termination. This is equivalent to a declaration that having once rendered any services, and although it was manifestly impossible for the picture to be produced without an agreement as to the leading male role, still plaintiff was under no necessity of making a good faith endeavor to reach an agreement on the actor to portray the leading male role, and that all of the negotiations and conferences to this end were completely useless.

COURT'S INSTRUCTION Q.
[R. 595.]

"If you find that both parties in their dealings concerning the filling of the leading male role, were motivated by and were acting in good faith in such dealings, then your verdict must be against Miss Sheridan on her complaint and must provide that she take nothing by that complaint unless she is entitled to recover under my previous instructions.

"When I talk about 'my previous instructions' I am talking about the instructions concerning section 29 of the contract."

This instruction is subject to the objections indicated to Instruction P above. It tells the jury that even though both parties acted in good faith in attempting to arrive at an agreement on the leading role, this would be immaterial if the plaintiff were entitled to recover under instruction H-1. The result is that even though the parties recognize that the picture could not be produced unless a leading actor was agreed upon, if both went forward in a good faith endeavor to agree upon such actor but were unable to reach an agreement, plaintiff could still recover under instruction H-1. The sum total effect of these instructions P and Q was to make it plain to the jury that noth-

ing that was done or omitted by the parties had any effect on the right of the plaintiff to recover if she had rendered any service pursuant to the contract and prior to its termination. The instruction also refers only to section 29 of the contract when it should have included the provision of section 1 of the contract providing that plaintiff was not required to render any services unless and until she approved an actor for the leading male role. Both the pleadings and the evidence are addressed to the theory that the rights of the parties were to be determined by the acts and negotiations of the parties respecting the substitute for Young, and that these rights and obligations were to be fixed by both of the provisions of the contract above referred to. This instruction as well as instruction H-1 and P, completely departed from the theory upon which the case was tried.

(B) *The Court Erred in Refusing to Give Instructions Requested by Defendant.*

The court refused to instruct the jury as requested by defendant in its instructions Nos. 1, 2, 5, 6, 7 and 8. These instructions embody defendant's theory of its defense and were not covered by other instructions given.

It is the duty of the court to give instructions expounding the law upon every reasonable theory of the case finding support in the evidence.

Bickford v. Pacific Elec. Co., 120 Cal. App. 542;

Ferrula v. Santa Fe Bus Lines, 83 Cal. App. 2d 416;

Rutherford v. Standard Eng. Co., 88 Cal. App. 2d 554.

A litigant requesting it is entitled to proper instructions presenting his theory of the case based upon the pleadings and proof, and if the parties to an action rely upon different theories, instructions should be given when requested as to each.

Bickford v. Pacific Elec. Ry. Co. (supra).

“While it is a well established rule that one may not complain of instructions given to a jury at his request (citing cases) and that a party requesting instructions upon a legal question which are given in another form is in no position to complain of other instructions upon that subject (citing cases) nevertheless the case is different where a requested instruction contains certain elements not covered by the instructions given.

“‘Where a trial court throws aside instructions asked by one or both of the parties and prepares written instructions of its own, these must fairly instruct the jury on all legal questions involved in the case, and it must appear that no injury has been done to the defeated party by refusal of the instructions asked by him.’ *Wacaser v. People*, 134 Ill. 438.”

Dowd v. Atlas Taxicab Co., 69 Cal. App. 9, 14.

Defendant's proposed Instruction No. 1 [R. 57] told the jury that the action arose from the failure of the plaintiff prior to the termination of her employment by the defendant to approve an actor to portray the leading male role. This instruction was justified by the fact that the only approval by the plaintiff expressly recognized the fact that defendant was not obligated to assign the actor approved to the role, and that if it did not do so plaintiff could not be required to render

her services under the contract until some actor proposed by the defendant was approved by the plaintiff. If plaintiff had approved such actor, then both of the parties would have been obligated to perform and the action would not have arisen. The court, however, took the position and expressly stated to the jury that the approval of Young bound the plaintiff to render her services to the defendant, and the only issue was as to whether she had rendered any such services.

As pointed out in *Defendant's proposed Instruction No. 2* [R. 58], the writing under which the plaintiff approved Robert Young expressly provided that defendant need not assign him to the picture but that any other individual proposed by the defendant had to be approved by the plaintiff before she was required to render her services. The refusal of the court to give this instruction is based upon the position which the court took in its instructions to the jury that despite the language of the contract and of the letter of April 29, 1949, the plaintiff nevertheless by the approval of Young became obligated to render her services to the defendant. This, we must emphatically assert, is contrary to the clear language of the contract and is the basis upon which defendant excepted to the refusal of the court to so instruct the jury.

Defendant's proposed Instructions Nos. 5 [R. 61], *6* [R. 62], *7* [R. 62] and *8* [R. 63] are based upon what the defendant contends are proper interpretations of the agreement between the parties, and because of the refusal of the court to give these instructions the jury was never properly and clearly instructed as to the legal meaning of the contract and of the letter of April 29, 1949.

Conclusion.

The rights and obligations of the parties to this action depend upon the proper construction of the agreement which was entered into between them. The agreement plainly said that the plaintiff could not be required to render any services to the defendant unless and until she had approved the actor who would portray the leading male role. In writing the plaintiff approved Robert Young for that role and by such writing agreed that defendant need not assign him to the role and that any other person assigned must be approved by her before she was bound to render any services pursuant to the contract. This right of approval by the plaintiff was for her benefit. Certainly the defendant had nothing to gain by providing that she should have such right of approval, and it must be assumed that she insisted that such approval should be conditional to her obligation to render services.

Young refused the role, as he was entitled to do under his contract, and after such refusal the parties engaged in an effort to find some individual whom the defendant was willing to propose and the plaintiff would approve. The plaintiff had nothing to do with the selection of any person to portray this role. It was the exclusive right and duty of the defendant to make the selection. The plaintiff could only approve or refuse to approve. If the defendant, in good faith, proposed to assign to the role an actor competent and qualified for the part and the plaintiff refused to approve such individual, and both parties acted in good faith, neither ever became obligated to perform under the contract and termination of the contract by the defendant upon such inability to agree was a right

which the contract gave to the defendant. If the defendant had actually assigned to the role an actor of recognized standing and ability qualified to portray the role, and the plaintiff in good faith had refused to approve such actor, each had done everything which the contract had required and neither could have been held to have breached the contract. If the plaintiff, by her actions and conduct or statements, indicated that she would not approve any of the persons proposed to be assigned to the role by defendant, actual assignment would have been an idle act and was not required.

The pleadings distinctly put in issue the question of whether, after Young refused the role, the defendant had breached the contracts by the failure to exercise good faith in the proposal of actors to fill the role, or had terminated the contract without affording plaintiff a sufficient and reasonable opportunity to approve one of the actors so proposed. The evidence of both parties was for the most part addressed to these issues. There was no dispute concerning the fact that plaintiff had, prior to the refusal of Young, read and discussed the script or that, after Young's refusal, there were numerous conferences concerning a substitute for Young, or that plaintiff had appeared for costume fittings. If these acts of the plaintiff—and no contention is made that plaintiff did anything else in performance of the contract—together with the conditional approval of Young by the letter of April 29, 1949, entitled the plaintiff to a verdict, then the trial was a waste of the time of the parties, the court and the jury.

The instructions of the court took from the jury the real issues of the case, completely departed from the

theory of the parties as to the matters in issue, erroneously determined the legal effect of the contract and the letter of April 29, and submitted the case to the jury on a completely false issue.

Appellant respectfully submits that the judgment should be reversed so that defendant may have what it is legally entitled to, and what it was denied by the court's instructions, namely, a determination by the jury of whether it had fulfilled the requirement of good faith in attempting to secure the approval of plaintiff of any actor to portray the leading male role in the picture, and because of the refusal of plaintiff to approve any one of the actors proposed, was justified in terminating the contract.

Respectfully submitted,

MITCHELL, SILBERBERG & KNUPP, and
GUY KNUPP,

By GUY KNUPP,

Attorneys for Appellant.

APPENDIX.

This Agreement, made and entered into at Los Angeles, California, this 29th day of April, 1949, by and between RKO Radio Pictures, Inc., a Delaware corporation, hereinafter called "Producer," and Ann Sheridan, hereinafter called "Artist,"

WITNESSETH:

1. Producer hereby employs Artist as an actress, performer and entertainer to portray the leading female role in the photoplay now entitled "CARRIAGE ENTRANCE" to be produced by Producer. Said photoplay may hereinafter be referred to as "CARRIAGE ENTRANCE" or as the "Picture," or as the "photoplay." Artist shall not, however, be required to render any services pursuant hereto unless and until she has approved each and all of the following:

- (a) The final shooting script of the screenplay for CARRIAGE ENTRANCE;
- (b) The director who will direct CARRIAGE ENTRANCE; and
- (c) The actor who will portray the leading male role in CARRIAGE ENTRANCE.

With respect to item (a) above, the Artist has heretofore approved the first draft estimating script entitled "CARRIAGE ENTRANCE," by Leopold Atlas, consisting of a one (1) page note, one hundred forty-eight (148) pages of screenplay and five (5) pages of synopsis covering the unfinished ending, all of which material is hereinafter referred to as the "Estimating Script," subject to such Estimating Script being completed and "polished." The

Artist agrees that she shall not have the right to disapprove of the final shooting script if it is a reasonable completion and development of the Estimating Script or does not depart from the novel CARRIAGE ENTRANCE and the Estimating Script so as to substantially alter and diminish the importance of the Artist's role as written in the novel CARRIAGE ENTRANCE and in the Estimating Script.

* * * * *

3. Artist hereby accepts the employment described in paragraph 1, and agrees to give her entire time and attention and to devote her best talents, efforts and abilities, exclusively to Producer during the term of Artist's employment hereunder, except as is provided in paragraph 5.

4. The term of Artist's employment hereunder shall start on such date as Producer may hereafter specify to Artist in writing, which date, however, shall not be earlier than June 1, 1949, nor later than July 6, 1949. Such starting date, however, shall be subject to the completion by Artist of her services in connection with the principal photography of the photoplay originally entitled "I WAS A MALE WAR BRIDE." If Artist has not completed such services before the starting date specified by Producer pursuant hereto, such starting date shall automatically be postponed until the day following the completion of such services by Artist.

Said term shall continue after the starting date thereof until Artist has completed all of her services in connection with the principal photography of CARRIAGE ENTRANCE.

* * * * *

6. On condition that Artist fully performs all of her obligations hereunder and as payment in full for Artist's services during the first fifteen (15) weeks of the term hereof (exclusive of periods of suspension) or such lesser period as may constitute the term hereof, and for all rights granted and/or agreed to be granted by Artist hereunder, Producer agrees to pay, or cause to be paid to, Artist the sum of One Hundred Fifty Thousand Dollars (\$150,000.00) (One Hundred Thousand Dollars (\$100,000.00) of which shall be deferred and payable only from the gross receipts of the Picture, as hereinafter provided), said One Hundred Fifty Thousand Dollars (\$150,000.00) being hereinafter called "the flat compensation," plus a sum (herein called the "percentage compensation") equal to ten percent (10%) of the net profits derived by Producer and its successors and assigns, from the distribution of CARRIAGE ENTRANCE, accruing during the period of ten (10) years from and after the first general release of CARRIAGE ENTRANCE in the United States. Artist's compensation shall be payable as follows:

- (a) Fifty Thousand Dollars (\$50,000.00) on account of the flat compensation on the first regular weekly payday after the principal photography of CARRIAGE ENTRANCE has commenced, but in no event later than the seventh day after such photography has commenced;
- (b) The balance of the flat compensation, to wit: One Hundred Thousand Dollars (\$100,000.00)

thereof, shall be deferred and shall be paid to Artist only from the gross receipts of CARRIAGE ENTRANCE accruing during the period of ten (10) years from and after the first general release of CARRIAGE ENTRANCE in the United States, and otherwise at the time and in the manner herein-after set forth;

- (c) The percentage compensation, and that portion of the flat compensation which is deferred, as aforesaid, shall, except as hereinafter provided, be computed and determined in accordance with the provisions of Articles 15A, 15B, 15C and 15D of the employment agreement dated April 29, 1949 between Producer and Polan Banks, a true copy of which is attached hereto, marked Exhibit "A" and by this reference made a part hereof. Whenever necessary, references to the "Producer" in said Exhibit "A" shall be deemed, for the purposes of this agreement, to be references to the Artist, and wherever necessary, references to the "Corporation" in said Exhibit "A" shall be deemed, for the purposes of this agreement, to be references to Producer. The statement in said Exhibit "A" to the effect that the Producer shall not be entitled to any share of the net profits of the Picture shall not, of course, apply under this agreement.

Producer warrants, so far as Artist is concerned, that the amounts payable under item (1) of subdivision (c) of Article 15D of said Exhibit "A" will not exceed Sixty Thousand Dollars (\$60,000.00).

- (d) That portion of the flat compensation which is deferred as aforesaid, shall be paid at the times and in the manner set forth in this subdivision (d), rather than at the times and in the manner set forth in Exhibit "A."

Said deferred flat compensation shall not be paid or payable to the Artist earlier than as follows:

Payable not earlier than:

The first \$20,000 thereof	January 1, 1950
The next \$20,000 thereof	January 1, 1951
The next \$20,000 thereof	January 1, 1952
The next \$20,000 thereof	January 1, 1953
The next \$20,000 thereof	January 1, 1954

That portion of the first Twenty Thousand Dollars (\$20,000.00) of said deferred flat compensation which accrues from the gross receipts of the Picture prior to or during the calendar year 1950 shall be paid to the Artist in installments of Five Hundred Dollars (\$500.00) per week, commencing on Producer's first regular payday during the calendar year 1950, and continuing throughout said calendar year, but only if and to the extent that said first Twenty Thousand Dollars (\$20,000.00) is or becomes payable from the gross receipts of the Picture; provided, however, that if said entire first Twenty Thousand Dollars (\$20,000.00) is or becomes payable during said calendar year, Producer may omit twelve (12) of said weekly payments to be made during said calendar year. As to any part of said first Twenty Thousand Dollars (\$20,000.00) which does not accrue

from the gross receipts of the Picture during said calendar year, the same shall be payable to the Artist at the times and in the manner set forth in Exhibit "A."

With respect to the second, third, fourth and fifth Twenty Thousand Dollars (\$20,000.00) of said deferred flat compensation, the same procedure shall be followed with respect to the calendar years 1951, 1952, 1953 and 1954 respectively.

Producer has heretofore delivered to Artist a copy of the Production-Distribution Agreement referred to in Exhibit "A," and Producer warrants that the same is a true copy thereof. The Producer agrees to deliver all statements of gross receipts to the Artist, and to make its books and records available to the Artist, and to make deposits to the account of the Artist, all at the times and in the manner provided for for the benefit of the "Producer" in Articles 3, 4, 5 and 6 of Section VII of the Production-Distribution Agreement referred to in Article 15A of said Exhibit "A."

Anything herein contained to the contrary notwithstanding, the compensation hereinbefore specified shall constitute payment in full for Artist's services only if the term of Artist's employment hereunder does not exceed fifteen (15) consecutive weeks. If said term, exclusive of any periods of suspension permitted hereunder, shall continue beyond fifteen (15) consecutive weeks, Producer agrees to pay Artist in addition to such compensation salary for the time said term continues beyond fifteen (15) weeks at the rate of Ten Thousand Dollars (\$10,000.00) per week. Artist shall be paid on a pro rata basis for

any incomplete week² at the end of such additional time, and, for the purpose of such prorating, one day's salary shall be One Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents (\$1,666.66). Salary for such additional time shall be paid to the Artist each week during the time said term continues beyond fifteen (15) weeks as aforesaid.

Artist shall not have any right, title or interest in or to CARRIAGE ENTRANCE, and Artist's interest in the net profits thereof shall not constitute a lien thereon or an assignment of the proceeds therefrom. Producer shall have the right to pledge, mortgage, assign, or otherwise hypothecate CARRIAGE ENTRANCE or the proceeds therefrom, either in whole or in part, without obtaining Artist's consent; provided, however, that no such pledge, mortgage, assignment or other hypothecation shall in any manner limit or impair any of Artist's rights hereunder. Artist acknowledges that Producer has not made, and does not now make, any representation with respect to the gross receipts or net profits to be derived or received from CARRIAGE ENTRANCE. Producer shall have full charge and control of the manner in which, and the terms upon which, CARRIAGE ENTRANCE shall be distributed, sold, exhibited and/or exploited, as well as all matters and things pertaining thereto.

7. Producer shall deliver to Artist as soon as the same are available, and not later than one (1) week prior to the starting date of the term hereof, a copy of the final budget for CARRIAGE ENTRANCE and a list of all defer-

ments payable out of the receipts from CARRIAGE ENTRANCE, which list shall show the name of all parties entitled to deferment, the amount each is entitled to, and the order and manner in which such deferments are to be paid.

.

12. If the term of Artist's employment hereunder shall begin later than the earliest date permitted therefor pursuant to paragraph 4, Artist agrees to report to Producer's studio or elsewhere when and as directed by Producer during the period (not exceeding, however, one week) prior to the starting date of said term, and to appear, assist and take part in tests, wardrobe fittings, conferences, publicity interviews, rehearsals, still photographs and the like in connection with CARRIAGE ENTRANCE, but Artists shall not in any event be required so to report during the period of thirty (30) days following Artist's return to Los Angeles. Artist shall not be entitled to any compensation for services rendered pursuant to this paragraph in addition to that specified in paragraph 6.

13. Artist shall render all services required under this agreement in accordance with the instructions of Producers, and pursuant to such rules and regulations as Producer may establish for the regulation of its business. Artist agrees that at all times from the date hereof until the expiration of the term hereof Artist will keep Producer advised of where Artist can be located without unreasonable delay, and that at all times during her term of employment hereunder Artist will be available and subject

to Producer's call, and will appear at Producer's studio, or at such other place as Producer may designate, ready, willing and able to perform Artist's services hereunder promptly upon notice from Producer. Any such notice may be given to Artist either orally, or in writing, personally, by telephone, mail, telegraph or any other medium of communication.

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21. If Artist is incapacitated or prevented from performing any or all of Artist's obligations hereunder by reason of sickness, disfigurement, impairment of voice, or by reason of any other disability, or if Artist's appearance or physical makeup shall be altered or changed to such an extent that Artist shall not have Artist's present unique and unusual value as an actress, performer or entertainer, or if Artist shall fail, refuse or neglect to perform any of Artist's obligations hereunder, or if Artist shall indicate, either personally or through Artist's representative, that Artist will at a future time fail, refuse or neglect to perform any of Artist's obligations hereunder, Producer may, at its election, suspend this agreement during any part of such incapacity, prevention, alteration, change, failure, refusal, neglect or indication of a future failure, refusal or neglect, and thereafter as hereinafter in this paragraph provided. Any such suspension due to any indication of a future failure, refusal or neglect may be continued from the time of such indication until Artist shall personally report to Producer, in the manner hereinafter provided, and thereafter, as hereinafter in this

paragraph provided. No such suspension shall prejudice Producer's right to terminate this agreement at any time for any of the reasons herein specified, and shall be deemed cumulative and not exclusive of any other remedy to which Producer may be entitled at law or in equity. Producer may terminate this agreement if Artist should at any time fail, refuse or neglect to perform any of Artist's obligations pursuant hereto, or if Artist should indicate, either personally or through Artist's representative that Artist will at a future time fail, refuse or neglect to observe or perform any of Artist's obligations hereunder, or if Artist shall in any other manner breach this agreement, or if any incapacity, prevention, alteration or change as hereinbefore referred to shall continue for an aggregate of five (5) days or more. Producer shall not be liable to Artist for any compensation hereunder after this agreement shall have been so terminated, except as is set forth in paragraph 22 hereof. If Producer terminates this agreement pursuant to this paragraph 21 during the first five weeks of the term hereof (exclusive of any periods of suspension permitted hereunder), Artist shall refund to Producer such pro rata portion of the Fifty Thousand Dollars (\$50,000.00) compensation theretofore received by Artist pursuant to (a) of paragraph 6 as is represented by that portion of such first five (5) weeks as occurs after such termination. For the purpose of such prorating, one week's compensation shall be taken to be Ten Thousand Dollars (\$10,000.00), and any part of an incomplete week shall be calculated on the basis of

One Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents (\$1,666.66) per day. If Artist shall, in good faith, while any suspension shall continue (and provided this agreement shall not in the meantime have been terminated by Producer) personally report to Producer ready, willing and able to resume the performance of Artist's obligations to Producer's satisfaction, Producer may nevertheless continue such suspension for a period of time (but not exceeding eight (8) weeks) necessary to make preparation for the actual utilization of Artist's services; provided, however, no such further suspension shall prejudice Producer's right to terminate this agreement at any time for any of the reasons herein specified, and shall be deemed cumulative and not exclusive of any other remedy to which Producer may be entitled at law or in equity.

22. Artist shall not be entitled to any compensation for any time during which this agreement is suspended. If this agreement is terminated pursuant to paragraph 20 or paragraph 21 and CARRIAGE ENTRANCE is thereafter released for general distribution with Artist appearing therein, Artist's flat compensation shall be prorated for the time the term of her employment hereunder continued (exclusive of periods of suspension) prior to such termination at the rate of Ten Thousand Dollars (\$10,000.00) per week, and for the purpose of prorating any portion of an unfinished week one day's compensation shall be One Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents (\$1,666.66). Any compensation theretofore received hereunder by Artist shall be credited

against any such payment. Any flat compensation to which Artist may be so become entitled in excess of Fifty Thousand Dollars (\$50,000.00) shall be deferred and paid to Artist as set forth in (b) of paragraph 6. In the contingency provided for in this paragraph 22, Artist's right to receive the percentage compensation provided for in paragraph 6 shall not be affected.

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29. Producer shall not be required to use Artist's services hereunder or to complete the production of CARRIAGE ENTRANCE, and shall be deemed to have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder. However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder.

No. 12927.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANN SHERIDAN,

Plaintiff, Appellee and Cross-Appellant,

vs.

RKO RADIO PICTURES, INC., a Delaware corporation,

Defendant, Appellant and Cross-Appellee.

CROSS-APPELLEE'S REPLY BRIEF.

MITCHELL, SILBERBERG & KNUPP, and
GUY KNUPP,

727 West Seventh Street,
Los Angeles 17, California,

Attorneys for Cross-Appellees.

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Defendant, Appellant and Cross-Appellee.

CROSS-APPELLEE'S REPLY BRIEF.

The appeal of Sheridan questions the correctness of the rulings of the trial court based upon the court's construction and interpretation of certain provisions of the contract under which RKO employed Sheridan to render her services as a motion picture actress in a motion picture to be produced by RKO. The provisions of the contract giving rise to the controversy are found in paragraphs 1 and 29 and in the various paragraphs fixing the time and manner of payment of compensation.

The court invited and received pretrial arguments, both oral and written, and the rulings complained of by Sheridan were the result of full and careful consideration of the differing viewpoints of the parties, and were not rulings made during the course of trial with only limited opportunity for reflection upon the arguments advanced.

After mature consideration, the court concluded as a matter of law:

“1. That Paragraph 29 of the Contract, and particularly the first sentence thereof, is to be interpreted so that the sentence be considered as an integral part of the whole contract and that the obligation of defendant, if any, could be liquidated by the payment of ‘minimum compensation.’

“2. That the second phrase in the first sentence of Paragraph 29 reading, ‘or to complete the production of “Carriage Entrance”’ should have added to it the phrase ‘with the artist’ and is to be read as though said phrase appeared in the Contract.

“3. That the phrase ‘minimum compensation’ as it appears in the Contract is not so ambiguous as to meaning so as to make it necessary to go outside of the four corners of the Contract to ascertain the meaning of the words and the court states as a matter of law that the phrase ‘minimum compensation’ means \$50,000.00.

“4. That defendant at all times had a right to rely on the first sentence of Paragraph 29 of the Contract and to fully perform its obligations by paying ‘minimum compensation’ and that such right was available to defendant at all times.

“5. That the first sentence of Paragraph 29 of the Contract does not contain such contractual obligations so that only by the payment of the minimum compensation can the defendant avail itself of that portion of the Contract.” [R. pp. 47-48.]

Before proceeding with our argument we call the attention of the court to the fact that Sheridan's brief contains certain statements of fact which find no support in the record. Thus, on page 6, the assertion is made: "The lengthy contract was devoted almost entirely to protecting the interests of the employer 'RKO.'" No part of the contract is before the court except that set forth in the appendix to the brief of Sheridan, and there is nothing in such excerpts to bear out this statement. There is nothing in the pleadings or in the evidence to suggest fraud, duress or mutual mistake, or that the contract was not one entered into freely and voluntarily by two parties, each competent to contract and each fully familiar with all the terms and conditions of the agreement, and each represented by agents and attorneys of their own choice. Sheridan sues on the contract exactly as written and there is no warrant for any suggestion or intimation of unfairness or over-reaching on the part of RKO.

Again, counsel for Sheridan says "it is Sheridan's position that the District Court erroneously applied the contract *drafted in its final form*¹ by the legal department of RKO, against Sheridan and in favor of RKO" (App. Br. p. 10). And on page 15, "Even if there were uncertainty, it is a settled rule in such cases that the contract is to be construed most strongly against the party who caused the uncertainty to exist—the party drafting the instrument, *in this case RKO.*" Significantly, neither of these

¹All italics in this brief are ours.

statements is supported by any reference to the record. Neither could be. We ask that we be permitted to go outside the record in answering these assertions because we know of no other way of refuting these unwarranted and misleading statements. The facts are these: Sheridan negotiated, in 1948, a contract with one Polan Banks, under the terms of which she was to perform her services in a picture based on the Polan Banks novel "CARRIAGE ENTRANCE." (See Sheridan's Op. Br. p. 4.) This contract was drafted but never executed. It was drawn by Sheridan's attorney, Loyd Wright. Under that contract Polan Banks Productions, Inc., was to produce and RKO was to distribute the picture. When Polan Banks Productions, Inc., and RKO agreed that RKO would produce as well as distribute the picture this contract—drawn by Sheridan's attorney—was submitted to and accepted by RKO. It is the identical contract entered into between Sheridan and RKO except for the changes necessitated by the fact that RKO became producer as well as distributor, and except for the addition of the words "or complete the production of 'Carriage Entrance'" in the first sentence of paragraph 29. All of the provisions characterized by Sheridan as being "almost entirely devoted to the protecting of the interests of the employer RKO" were written into the contract by Sheridan's attorney at a time when it was not even contemplated that RKO would be the employer. We do not contend that the matter of who drafted the contract is important—indeed with no evidence on the matter we do not see how it could be—but if any rule of construction is to be resorted to on that basis, the true facts indicate that the interpretation should be against Sheridan rather than RKO.

Summary of the Argument.

The contract between the parties contemplates the performance by Sheridan of her services in the leading female role in the motion picture entitled "CARRIAGE ENTRANCE." It is therein provided that:

1. She shall not be obligated to perform her services thereunder *unless and until* she approves the actor who would portray the leading male role.
2. RKO shall not be required to use her services or complete the production of "CARRIAGE ENTRANCE" and shall be deemed to have fully performed all its obligations to Sheridan by paying to her the minimum compensation payable thereunder.
3. If because Sheridan does not approve an actor for the leading male role, she does not become obligated to and does not render any services pursuant thereto, RKO shall not be required to pay her any compensation.

The right of RKO to discharge all its obligations to Sheridan by payment of minimum compensation was a valid limitation of liability available under all circumstances if the services of Sheridan were not used in the picture or the picture was not completed with Sheridan appearing therein. If Sheridan rendered any services and the picture was released with her appearing therein, the liability of RKO is fixed by paragraph 22. The fact that RKO erroneously assumed that it was justified, because of her failure to approve an actor for the leading male role, to terminate the contract without any liability, would not deprive it of the benefit of this provision which gave RKO the right to terminate the contract without any cause and upon a resulting limited liability.

The contract was not ambiguous. Taking all of its provisions together, it clearly defined minimum compensation as \$50,000.00 and extrinsic evidence to interpret such term was not admissible, nor was the evidence offered by Sheridan of any aid—even had the contract been ambiguous.

I.

The Court Below Correctly Construed the Contract to Limit Any Right of Recovery to \$50,000.00.

A. The Relevant Provisions of the Contract.

PARAGRAPH 1.

Sheridan is not required to render any services under the contract *unless* and *until* she has approved: (a) The final shooting script of the photoplay; (b) The director who will direct the photoplay; (c) The actor who will portray the leading male role.

PARAGRAPH 4.

The term of the Sheridan employment shall commence on such date as may be designated by RKO not earlier than June 1, 1949, and not later than July 6, 1949. Under the compensation provisions of the contract it is specified that the compensation fixed is for payment in full for Sheridan's services only if the term of her employment does not exceed fifteen weeks, and that if it is extended beyond fifteen weeks, Sheridan is entitled to receive additional compensation at the rate of \$10,000.00 per week, payable weekly. Under this provision, therefore, unless the services of Sheridan were completed within fifteen weeks after July 6, 1949, she was entitled to receive additional compensation for any period beyond fifteen weeks after July 6, 1949, during which she was working in the picture, at the rate of \$10,000.00 per week.

PARAGRAPH 6.

On condition that Sheridan performs all her obligations, RKO agrees to pay her \$150,000.00 "being hereinafter called the flat compensation," \$100,000.00 of which is deferred and payable only from the gross receipts of the picture, plus 10% of the net proceeds "being hereinafter called the percentage compensation." The compensation of Sheridan is payable as follows: \$50,000.00 on account of the *flat compensation* on the first regular pay day after photography commences; the balance of the *flat compensation* in installments from the gross receipts only after distribution expenses and the negative costs of the picture are first recovered by RKO.

PARAGRAPH 12.

If Sheridan's employment begins later than June 1, 1949, Sheridan agrees to report to RKO during the week prior to the starting date of the term "and to appear, assist and take part in tests, wardrobe fittings, conferences, publicity interviews, rehearsals, still photographs and the like, in connection with CARRIAGE ENTRANCE." *Sheridan is not entitled to any compensation for such services in addition to compensation fixed in paragraph 6.*

PARAGRAPH 21.

If Sheridan is incapacitated from performing, or refuses to perform, her obligations, RKO may either suspend the agreement during such incapacity for as long as such refusal continues, or may terminate the agreement. If the termination takes place during the first five weeks of the term, Sheridan shall refund a pro rata proportion of \$50,000.00 compensation theretofore received by her pursuant to paragraph 6 at the rate of \$10,000.00 per week.

PARAGRAPH 22.

If the agreement is terminated but the picture thereafter released for general distribution with Sheridan appearing therein, her *flat compensation* shall be prorated for the time the term of her employment continued prior to termination at the rate of \$10,000.00 per week, and she shall be entitled to receive the percentage compensation provided for in paragraph 6.

PARAGRAPH 29.

This paragraph reads as follows:

"Producer shall not be required to use Artist's services hereunder or to complete the production of CARRIAGE ENTRANCE, and shall be deemed to have fully performed all its obligations to Artist by paying Artist the *minimum compensation* payable to Artist hereunder. However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder."

B. The Contract Provision Limiting the Compensation Payable to Sheridan in Certain Contingencies Is, in All Respects, Legal and Valid.

In view of the fact that much of the argument revolves around paragraph 29, it may be well here to consider the general legal effect and validity of such a contractual provision. Agreements limiting damages recoverable to an agreed maximum have been generally sustained.

"Contractual limitation of liability to an agreed maximum must be distinguished from a penalty or

liquidated damages though every valid agreement for liquidated damages operates as a kind of limitation. Aside from certain restrictions in the field of public utility law, chiefly relating to common carriers, if the agreed amount to which liability is limited is something more than a merely nominal sum, the validity of the provision has long been recognized. It is neither a penalty in that it does not normally operate *in terrorem* to induce proper performance, nor is it of the nature of liquidated damages since it does not purport to be a pre-estimate of probable damages resulting from a breach."

Williston on Contracts, Rev. Ed., Vol. 3, p. 2197;
Restatement—Contracts, p. 554;

Myers Motors v. Kaiser-Frazer Sales Corp., 178
F. 2d 291;

Warren Scharf, etc. Co. v. Laclede, 111 Fed. 695.

In *Lorentz v. RKO Radio Pictures, Inc.* (9th Cir.), 155 F. 2d 84, the court had under consideration the following clause in a contract between a producer of motion pictures and RKO (p. 86):

"The Producer expressly waives and releases the corporation from all claims or causes of action based on the failure of the Corporation actually to utilize the services of the Producer or the results thereof, or on the failure of the Corporation to produce or to release or to continue the distribution of the Pictures; provided, however, that nothing contained in this Article of this agreement shall be deemed to relieve the Corporation of its obligation to pay the Producer the fixed compensation payable to him pursuant to Article 1 of Section 11 of this Agreement."

The contract between the parties covered the services of Lorentz in two pictures. He was to receive as fixed compensation the sum of \$50,000.00 per picture, with additional compensation if production required more than forty weeks. Lorentz was also to receive additional benefits in a percentage of the net earnings of the picture and in screen credit as producer and director. After Lorentz had completed 40 weeks services on the first picture and had been paid therefor, but before the first picture was completed, RKO terminated the contract. Lorentz brought suit alleging the termination was wrongful and sought recovery of:

1. Fixed compensation of \$50,000.00 for the second picture.
2. Additional fixed compensation that he would have received if the first picture had been completed.
3. Amounts equal to the percentage of proceeds that he would have received upon production and distribution of the pictures.
4. Damages suffered because he was deprived of screen credit.

A summary judgment was granted as to all of the causes of action other than the cause of action for the recovery of fixed compensation for the second picture. As to that item, RKO admitted that if its discharge of Lorentz was wrongful, he was entitled to recover the sum of \$50,000.00 as fixed compensation, just as it admits here that if it was not justified in terminating Sheridan's contract it is liable for "minimum compensation."

With respect to the clause of the contract quoted above, Judge Stephens said (p. 86):

“The whole contract sets out the obligations of both parties, and the waiver portion limits the obligations of RKO in circumstances not unlikely to arise in the type of enterprise covered by the contract. There are no apt expressions used which indicate any restricted application of the waiver nor to suggest that the payment of all fixed compensation is a condition precedent to its application.

“It is well to recall that the very basis for a ‘waiver and release’ from liability is ‘the failure of the corporation actually to utilize the services of the producer or the results thereof.’ Thus, the contract makes employment certain and as well the payment of the fixed compensation. Such obligation is fixed, but the work to be done and the results of the work must remain in the sound discretion of the moving picture corporation. The expensive business enterprise may by the turn of events at any time indicate the wisdom of discontinuing the production or the showing of a photoplay. Should events of such portent occur, the corporation is absolved from liability from prospective benefits to appellant. Appellee has reserved decision on such question to its own discretion.”

Sheridan contends (Op. Br. p. 18) that Lorentz is not in point, both because of difference in the language in the clauses limiting liability and because of differing facts. With respect to the first contention, it may be pointed out that the court, *in its decision*, says that the release clause must be considered as an integral part of the whole contract, which is exactly the position which the court below took in this case. The result is, that irrespective

of circumstances, the liability of RKO is limited to the payment of minimum compensation.

As differentiating the two situations on a factual basis, Sheridan says that Lorentz had received \$50,000.00, whereas Sheridan had received nothing. The fact is that Lorentz had received no compensation whatever for the services which he was to render in the second picture. Nor is it true, as counsel for Sheridan says, that in the *Lorentz* case there was a definite holding that the employer had not been guilty of breach of contract. On the contrary, on the motion for summary judgment the employer admitted that unless it was justified in discharging Lorentz as and when it did, it has been guilty of breach of contract and the defendant was entitled to recover the fixed compensation which the limitation clause provided for. The two cases are absolutely on all fours.

The Sheridan brief, page 14, refers to the rules against the adoption of the construction of a contract which will work a forfeiture, but clearly that rule has no place in construing this contract.

Myers Motors v. Kaiser-Frazer Sales Corp., 178
F. 2d 291;

Warren-Scharf, etc. v. Laclede Const. Co., 111
Fed. 695.

Paragraph 29 of the contract merely fixes the limit of liability of RKO in the event that it sees fit not to use the services of Sheridan in the picture or not to complete the production of the picture with Sheridan. It is a simple contract provision agreed to by Sheridan and no more "permits injustice or places one party at the mercy of the other" than does any other provision of the contract. The validity of such a contract is supported by authori-

ties cited above. It is difficult to see any injustice to Sheridan in the provision. If she renders no services in the photography of the picture or the picture is not completed with her in the leading female role, RKO receives nothing of value, but it must still pay Sheridan the sum of \$50,000.00 for the right to discharge its obligations under the contract.

Sheridan also calls attention, page 14, to the provisions of paragraphs 20, 21 and 23, of the contract, under which RKO was given the right of termination upon the happening of events beyond its control, upon refusal of Sheridan to perform, and upon the breach by Sheridan of the morality clause. These provisions, of course, afford RKO the right of termination *for cause without liability*, and are to be distinguished from the first sentence of paragraph 29 which fixes the liability for termination *without cause in the amount of the minimum compensation* to be paid to Sheridan.

C. The Court Correctly Held That the Extent of Liability of the Defendant Was to Be Determined Under Paragraph 29 of the Contract.

**1. THE PROVISIONS OF PARAGRAPH 29 WERE
OPERATIVE ON AUGUST 17, 1949.**

Sheridan's argument is that RKO could not limit its liability under paragraph 29 because the paragraph was not operative for the reason that Sheridan did render services and the picture was completed, and also because RKO did not elect to rely on the provisions of the paragraph.

Consideration of this paragraph with all the other provisions of the contract make it plain that the parties were contracting with the ultimate object of enabling RKO to

produce a motion picture in which Sheridan would render her services in the leading female role. They were not contracting for the purpose of securing the services of Sheridan in appearing for make-up, costume fittings or discussions concerning the actor to portray the leading male role. Nor was it of interest, nor did either party have in contemplation what might occur in completing production of the picture if Sheridan did not appear. It must be clear that when the contract was executed the parties dealt on the assumption that Sheridan would render her services as the leading lady and that if she rendered no services of that character neither party, at that time, had any interest in the future completion of the picture with some other actress. Certainly services rendered by Sheridan in costume fittings, appearing for make-up and hair dressings or discussions with respect to a leading man were of value only in the event that Sheridan appeared in the actual photography of the picture. Paragraph 12 recognizes this fact and provides that no compensation, in addition to that provided in paragraph 6, shall be paid for such services. Paragraph 22 recognizes the right of Sheridan to compensation even though the contract is terminated by reason of her incapacity (par. 20) or her refusal to perform (par. 21) provided the picture is released *with Sheridan appearing therein*.

Since the plain object of the contract was to secure the services of Sheridan in the photography of the picture, it is submitted that paragraph 29 could only mean that RKO was not required to use Sheridan's services in the photography of the picture, and was not required to complete the production of "CARRIAGE ENTRANCE" with Sheridan in the principal female role. This is the

plain common sense meaning of the contract, and the court neither interpolated words nor went outside the four corners of the agreement to reach this result. Nothing is more clearly established or more fundamental than the proposition that a contract is to be construed according to the intention of the parties, and that this intention, where possible, is to be gathered from the instrument and by taking into consideration all of the provisions thereof.

Civ. Code, Sec. 1639;

Watson v. Rotary Colorprint, Inc., 73 Cal. App. 2d 119;

Tillis v. Western Fruit Growers, Inc., 44 Cal. App. 2d 826;

Civ. Code, Sec. 1641;

Moore v. Woods, 26 Cal. 2d 621;

Olson v. Biola Coop. Raisin Growers Assn., 33 Cal. 2d 664;

Lion Oil Co. v. Golf Oil Co., 181 F. 2d 731.

Sheridan intimates that the object of this paragraph 29 was to prevent any claim of Sheridan based on deprivation of the opportunity to exercise and display her talents (an opportunity of which we may observe, parenthetically, she was deprived only because of her refusal to approve any of the numerous persons proposed for the leading male role). There is nothing in the contract or in the record to support this contention and we think plain the objective of the paragraph is that stated by Judge Stephens in the *Lorentz* case (p. 86):

“The expensive business enterprise may by the turn of events at any time indicate the wisdom of discontinuing the production or the showing of a

photoplay. Should events of such portent occur, the corporation is absolved from liability from prospective benefits to appellant. Appellee has reserved decision on such question to its own discretion."

D. The Failure of RKO to Pay or Tender Minimum Compensation Did Not Constitute an Election Not to Rely on Paragraph 29.

The argument of Sheridan admits that had RKO paid or tendered minimum compensation at the time the contract was terminated, it would have fully satisfied its obligations under the contract. Indeed no other position would be tenable for the contract makes such payment full performance. Sheridan contends that since RKO failed to pay or tender the minimum compensation, Sheridan may recover not only that amount but also all amounts which she might have recovered had she performed all of her services under the contract. Since payment of the minimum compensation would be full performance of all the obligations of RKO it is difficult to see how this position can be asserted for it is axiomatic that one may not recover as damages for breach of a contract a greater amount than would have resulted from performance.

Civ. Code, Sec. 3358;

Richardson v. Davis, 116 Cal. App. 388, 390;

Johnson v. Hinkel, 29 Cal. App. 78.

The position of RKO was and is that because Sheridan failed to approve an actor to portray the leading male role in the picture, termination of the contract was justified. Had it been able to successfully maintain this position before the jury, Sheridan could have recovered nothing. Now because the jury found the facts against RKO,

Sheridan asserts a right to recovery not only minimum compensation, but also the balance of her flat compensation as well as her percentage compensation. But since the contract makes payment of the minimum compensation, full performance of all of the obligations of RKO, clearly Sheridan could recover no larger amount upon any theory. It may and frequently does happen that delay in payment of the amount eventually found due under a contract results in incidental loss to the prevailing party, and the law attempts compensation by adding interest—as here where the plaintiff recovered some \$5,162.42 as interest.

Sheridan argues that the failure to pay or tender the minimum compensation was a failure of the consideration which passed to Sheridan for her promise to accept minimum compensation as full performance by RKO. Failure or refusal to pay the fixed compensation does not constitute a failure of consideration. It may give the non-defaulting party the right to sue immediately or release him from his obligations under the contract, but it does not constitute a failure of consideration. The situation can be no different if RKO paid the sum of \$50,000.00 than it would be if Sheridan were entitled to recover such sum by action.

“Failure of consideration does not, of course, mean the nonpayment of the purchase money according to the agreement, the liability to pay, though default be made, being a consideration.” (6 Cal. Jur. p. 208.)

“A total breach of contract is a breach where remedial rights provided by law are substituted for all the existing contractual rights, or can be so substituted by the injured party.” (Restatement of Contracts, sec. 313.)

So, far from claiming the consideration for the promise failed, Sheridan demanded, and by verdict of the jury obtained, the exact amount of such consideration.

In *Lorentz v. RKO*, *supra*, the plaintiff advanced the identical argument, and the court there said (p. 86):

“The fact that the fixed compensation had not been paid in full at the time the action was brought did not constitute a failure of consideration. Non-payment is not synonymous with failure of consideration.”

E. The Termination of the Contract Did Not Obligate RKO for Any Amount Exceeding the Minimum Compensation.

The termination of the contract was an absolute right given to RKO. If it terminated the contract for cause it was without obligation to Sheridan. If it terminated the contract without cause it was obligated to pay the minimum compensation. The jury having found the termination to be wrongful, the contract fixed the measure of recovery and the mere assignment of a ground of termination, which the jury found groundless, could not increase the measure of recovery beyond what it would have been had no ground been assigned.

Since the exclusive subject matter of the contract is the use of Sheridan's services, and since Sheridan and RKO are the sole parties thereto, the manifest purpose of this provision is to establish RKO's maximum liability to Sheridan in the event Sheridan's services are not used or if used, the production of "CARRIAGE ENTRANCE" is not completed with Sheridan appearing therein, *i. e.*, to establish RKO's maximum liability upon termination of the contract by whatever process including abandonment.

The failure to use Sheridan's services or to complete the production of the picture could not constitute a breach, for these are contractual rights expressly given to RKO. Any other interpretation would utterly disregard the phrase of "all of its obligations to the artist."

The second sentence of paragraph 29 precludes any liability on the part of RKO to Sheridan should Sheridan fail to become obligated under the contract and fail to render services pursuant to any obligation under the contract. Paragraph 29 as a whole, then, simply sets out the maximum and minimum limits of RKO's liability upon termination of the contract. The maximum limit of "the minimum compensation" is provided for in the first sentence and controls if Sheridan's services are not used by reason of RKO electing not to make use thereof. The minimum limit is provided for in the second sentence and controls if Sheridan's services are not used by reason of Sheridan failing to approve an actor for the leading male role.

The notice of August 17, 1949, did not constitute an election or waiver. On August 17 RKO notified Sheridan that it would not use her services as contemplated by the contract. Such notice was given pursuant to the express provisions of the second sentence of paragraph 29. Whether or not the second sentence controlled on the facts giving rise to the notice, the overall provision of the first sentence providing that RKO is not required to use Sheridan's services or complete the production of the picture still remains a material and operative provision of the contract; and since by its terms RKO was not required to use said services or complete such production, the only question remaining is whether RKO owes Sheri-

dan nothing by the terms of the second sentence, or the minimum compensation referred to in the first sentence.

Sheridan does not argue that RKO was bound to use her services or complete the production. By express provision it was not. By the notice of August 17 RKO simply availed itself of this contractual right. The notice ascribed the second sentence of paragraph 29 as its reason for failing to use Sheridan, and limited its liability accordingly. While RKO may be in error as to the reason and that it was without liability to Sheridan, it is not in error in assuming it was not required to use her or complete the production of the picture.

It is difficult to see how, in refusing to use Sheridan, for whatever reason, right or wrong, RKO could breach a covenant to employ when, in advance and by express provision, it had covenanted against any such absolute duty. Since the contract provided that RKO did not have to use Sheridan's services, a failure or refusal to use them would be consistent with the contract and could not constitute a breach thereof. Of course if RKO failed to use Sheridan's services without fault on Sheridan's part, then by the terms of the first sentence RKO would be liable for the minimum compensation agreed by each party to be the same as and equivalent to RKO's full performance. But, since the payment of that amount is deemed to be the same as full performance, and since the general law is that the injured party can recover not more than the other party's full performance, RKO cannot be held for any amount in excess of that amount designated as equivalent to its full performance.

Such would be the case not only here where the absence of any absolute duty to employ precluded a breach, but also where a breach was possible and did occur. Assuming

the notice of August 17th constituted an anticipatory breach by RKO, it amounted to RKO's preventing Sheridan from performing. At page 200, 4 Cal. Jur. 10-year Supp. is found the following expression of the general and California rule:

“Remedies upon prevention of performance. In the event of a prevention of performance whether by repudiation or otherwise, the injured party has an election to pursue any of three remedies. He may treat the contract as rescinded and recover an *assumpsit* insofar as he has performed. Or, he may keep the contract alive for the benefit of both parties, being at all times ready and able to perform. Or, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing, *or for such* other damages as he is entitled to.” (Emphasis added.)

Assuming prevention by RKO, Sheridan would be limited to “such other damages as he is entitled to,” *i. e.*, the minimum compensation. To hold otherwise would be to render meaningless the entire last clause of the first sentence of paragraph 29, as its only ascertainable purpose is to measure the damage to Sheridan should her services not be used.

Paragraph 29 relieves RKO from an absolute obligation to use Sheridan and further provides that, depending on fault, either the minimum compensation or no compensation shall be paid Sheridan in the event her services are not used. The two sentences of the paragraph designate only RKO's alternative liabilities in the event the contract is terminated. If RKO misconceived its liability that misconception could not foreclose to either party

RKO's correct liability as set out in the contract. Therefore, in terminating the contract RKO was not called upon to elect between remedies available to it, but only to proceed under one or the other of two separate substantive rights provided it by the contract to the end that the contract be discharged.

"Doctrine of 'election of remedies' has no reference to transactions giving rise to distinct and independent grounds of action which may be concurrently or consecutively pursued, *or to situations involving choice between substantive rights.*"

Williams v. Robinson, 168 So. 644.

The remedy here available to RKO was termination, that was the remedy it pursued, and no remedy inconsistent therewith was resorted to by it. Hence, the choice of one of two alternative rights by or through which the remedy was sought cannot bar subsequent recourse to or nullify the other alternative right, for, as indicated, the doctrine of conclusive election does not apply to the choice of rights.

Were the election doctrine here applicable, however, RKO's mistake was one of fact, *i. e.*, an erroneous conclusion regarding the existence of Sheridan's good faith. The rule of the doctrine does not apply to mistakes of fact, even where the suitor in a first action has mistaken his remedy and sought redress incompatible with the facts of his case. Notwithstanding the bringing of such an action, he can choose over and proceed again.

"While it is a general rule that one may not pursue inconsistent remedies this is subject to a number of exceptions, of which two are particularly applicable here. One exception is where no prejudice to the rights of the defendant would result (*Campanella v. Campanella*, 204 Cal. 515 (269 Pac. 433); *Com-*

mercial Centre R. Co. v. Superior Court, 7 Cal. (2d) 121 (59 Pac. (2d) 978, 107 A. L. R. 714). In the last case cited, the court said: "The doctrine of election of remedies is but a specific application of the equitable doctrine of estoppel, and it has been frequently held that a change in remedies does not bring about an election of remedies unless the change involves a prejudice to the opposing party." . . . Another exception to the general rule is applied in those cases where it does not appear that the prior attempted remedy was, in fact, available to the party attempting to pursue it. (*Agar v. Winslow*, 123 Cal. 587 (56 Pac. 422, 69 Am. St. Rep. 84); *Dickinson v. Electric Corp.*, 10 Cal. App. (2d) 207 (51 Pac. (2d) 205).) In the last of these cases, it was said: "It was an attempt to assert a right which did not exist; and one asserting such supposed right is not thereby estopped from later pursuing his rightful remedy." . . . "

Prussing v. Prussing, 46 Cal. App. 2d 347, 353.

RKO's termination under the provisions of the second sentence resulted in no prejudice to Sheridan, since it could have terminated anyway, and since, if wrong in disclaiming all liability, it still remains obligated to Sheridan for the minimum compensation. That brings any so-called election under the first exception above cited. RKO's fault, if any, was a mistake of fact. That, *per se*, brings it under the second exception. Thus, under the rules governing the doctrine, an erroneous choice of available rights under which to terminate certainly could not have been conclusive on the chooser.

Nor did RKO waive its rights under the first sentence by proceeding under the second. Waiver is an intentional relinquishment of a known right. It may be expressly or impliedly manifested. Here no waiver was expressed and

on the facts none was implied. The assertion of one right has nowhere been held to automatically manifest the waiver of its alternatives or rights secondary to it. Under the present circumstances, and without more, RKO could be deemed to have waived the benefits of the first sentence only had it made an irrevocable election to abandon the remedies thereof and to stand exclusively upon those of the second. As has been seen, this it did not do.

Likewise, it is not estopped from terminating the contract under the terms of the first sentence should the provisions of the second sentence prove unavailable to it. If the notice of August 17 could be deemed to be misrepresentation sufficient to raise an estoppel, which is highly unlikely, still no prejudice to Sheridan resulted therefrom since if the choice of alternatives was wrong Sheridan yet is entitled to the minimum compensation which is the maximum amount she could have received under the contract were here services not used.

In short, RKO was never in the position of interpreting a factual situation at its peril. It was either liable for the minimum compensation or not liable at all. If its application of the provisions of the second sentence was wrong, the only possible alternative is that provided for in the first sentence, for by the terms of paragraph 29 only one or the other sentence thereof *can* apply where Sheridan's services are not used.

By giving notice that it was not liable at all, RKO could not become liable under the contract for an amount greater than that already provided for by the contract itself. By failing to tender the amount of its maximum liability, RKO could not terminate and forever foreclose its rights under the minimum compensation provision.

At most, therefore, Sheridan has a cause of action against RKO for the payment of money in the amount of the agreed minimum compensation.

Sheridan's position, as we see it, arises from the failure to recognize that the right of RKO to terminate the contract was absolute. It assigned a cause for termination which it was not able to maintain before the jury, but the right of termination was at all times an operative provision of the contract, and the fact that termination was without cause simply brought into play the first sentence of paragraph 29 rather than the second. The cases cited by Sheridan are not in point for the reason that in all such cases the act or omission of the defending party was a breach of contract—here it was a right given by the express terms of the contract.

Counsel cites the ruling of the court below (Op. Br. p. 25), in a memo prepared for counsel on December 13, 1950, but fails to point out that thereafter the court considered further oral and written argument, and its final conclusion is embodied in the declaration.

“(7) That the first sentence of paragraph 29 does not contain such concurrent obligations so that only by the payment of the minimum compensation can the studio avail itself of that portion of the contract;

“(8) That the question of election is not in the case, since at all times the studio had a right to rely on the first sentence of paragraph 29 and to fully perform its obligations by paying minimum compensation. Since this right was available at all times, the notice of the studio, pursuant to the second sentence of paragraph 29, does not constitute such an election as would prevent the studio from concurrently or thereafter, relying on the first sentence of paragraph 29.” [R. pp. 39-40.]

II.

The Phrase "Minimum Compensation" Is Not Ambiguous. Construing the Contract From Its Four Corners, It Clearly Means the Sum of \$50,000.00.

It is the rule established by statute in California that when a contract is reduced to writing the intention of the parties is to be ascertained from the writing alone if possible (Civ. Code, Sec. 1639), and the whole of a contract is to be taken together so as to give effect to every part if reasonably possible, each clause helping to interpret the other. (Civ. Code, Sec. 1641.)

Paragraph 6 provides Sheridan's compensation. Thereunder she is to receive the sum of \$150,000.00 "being hereinafter called the '*flat compensation*' (plus a sum hereinafter called the '*percentage compensation*') equal to 10% of the net profits." Sheridan's compensation is payable as follows:

(a) \$50,000.00 on account of the *flat compensation* on the first regular weekly pay day after the principal photography of CARRIAGE ENTRANCE is commenced;

(b) The balance of the *flat compensation*, to wit \$100,000.00 is deferred and paid *only* from the gross receipts of the picture ("gross receipts" being further defined in the contract as being the amount remaining after the costs of production and cost of distribution have been paid) and such balance is consequently payable only in the event that there is such surplus of proceeds;

(c) The *percentage compensation* of 10% is payable from the net proceeds of the picture. Further provision is made that "that portion of the *flat com-*

compensation which is deferred” is to be paid in installments over a course of ten years only to the extent that the proceeds of the picture are sufficient to pay such amount.

The only money which Sheridan would certainly receive would be the sum of \$50,000.00 payable during the first week of photography. Beyond the payment of this amount, RKO had no fixed or absolute duty. The remainder of the “*flat compensation*” was payable only upon a contingency—namely, that the proceeds received should exceed the cost of production and the cost of distribution in an amount sufficient to pay the remaining \$100,000.00. The parties in the very nature of things must have contemplated that in the event Sheridan’s services were not used or the production of the picture not completed with Sheridan, there could and would be no payment of any amount in excess of \$50,000.00, for there would have been no possible fund from which payment thereof could be made. The payment of the minimum compensation is made full performance of all of the obligations of RKO. Such obligations were:

(a) The payment of \$50,000.00 during the first week of photography;

(b) The payment of \$100,000.00 additional *if, but only if*, the proceeds or distribution exceeded the cost of production and distribution by that amount.

(c) The payment of 10% of the *net* profits.

The parties when they substituted payment of the minimum compensation for the payment of these amounts, were speaking of the minimum compensation which Sheridan would receive were the services of Sheridan used and

the production of the picture complete, for that is what the contract contemplated. If A agrees to pay B \$500.00 absolutely, and additional amounts contingently, can there be any doubt that the minimum amount to be paid is \$500.00? Were the additional amounts payable absolutely, then there would be no difference between the minimum and maximum amounts payable to Sheridan—only a difference in the time of payment. But where, as here, only \$50,000.00 is payable absolutely and the remainder of the payments are contingent on sufficient proceeds being received from the distribution, the contingency plainly distinguishes and defines what is meant by minimum compensation.

As pointed out above, not only was the balance of the flat compensation, to wit \$100,000.00 contingent upon the receipt of proceeds beyond the cost of production and distribution, but it could not have become payable at all in either of two situations—if the services of Sheridan were not used, or the production of the picture not completed. These are the situations with which the provision of the contract deals. If the production proceeded beyond the date fixed for payment of the sum of \$50,000.00, to wit the first regular weekly pay day after principal photography commenced, that sum would become payable, but the balance of the flat compensation, \$100,000.00 would not. The phrase “minimum compensation payable hereunder” contemplates the payment of some compensation, and if any compensation becomes payable to the artist under the contract, the amount thereof could not be less than \$50,000.00. This is the first and minimum

amount “payable hereunder” and comes exactly within Webster’s definition of minimum—“the least amount possible.”

There are other provisions of the contract which emphasize this interpretation. The contract expressly says that “flat compensation” (the amount which Sheridan now contends is referred to by the phrase “minimum compensation”) is thereafter referred to as “flat compensation.” It is a fact that throughout the contract wherever the sum of \$150,000.00 is mentioned, that sum is referred to as “flat compensation.” To emphasize this point we have underscored the phrase where used in the contract.

The interpretation which Sheridan would have the court adopt would deny all meaning to the phrase “minimum compensation” and would change the meaning of the words “minimum compensation” to the sum of \$150,000.00—a sum which the contract repeatedly labels as “flat compensation.” The intention of the parties to differentiate between “minimum compensation” and “flat compensation” is plain and clear, and there is no reason to assert that the terms mean the same thing. It would have been a very simple thing, if the parties had \$150,000.00 in mind, in paragraph 29 to have said “flat compensation” for this is the way the sum of \$150,000.00 is designated throughout the contract.

Sheridan contends (Op. Br. p. 33) that our argument not only does violence to the language of the contract but is self-defeating. We have sought to demonstrate that so far from doing violence to the language of the con-

tract, the court's interpretation of the phrase "minimum compensation" is the only reasonable and logical meaning which can be given the language used. The argument that our contention is self-defeating is based upon the fact that if Sheridan performed services in excess of fifteen weeks, she would receive not only \$50,000.00 during the first week of photography, but also the sum of \$10,000.00 for each week in excess of fifteen weeks after the starting date of the contract term. This argument merely highlights the position of RKO. If the court was asked to rule on the question of what was meant by "minimum compensation" if a choice was presented between the amount to be paid in the first week of photography, and that amount *plus* the amount payable *if* services were rendered in excess of fifteen weeks, there could certainly be difficulty in making that choice. Here again it is the contingency which elucidates the term. If more is payable under one contingency than under another, clearly the latter must be the minimum payable under either.

The case of *Lion Oil Co. v. Gulf Oil Corporation*, 181 F. 2d 731, is in point on the proposition that the meaning of a particular provision of a contract must be gathered from the whole instrument. Therein the court said (p. 733):

"In determining whether the trial court erred in interpreting the contract as it did, our duty is restricted to the interpretation of the contract as the parties made it for themselves. It is a fundamental rule in the interpretation of agreements that the intention of the parties must be deduced, not from specific provisions of the instrument, but from its entire context. This is a rule of good sense and

sound logic because the intention of the parties is not evidenced by any part or provision of the instrument but by every part and provision so construed as to be consonant with every other and with the entire agreement. Taking the contract by its four corners and examining it in the light of the circumstances surrounding the parties at the time it was executed, its intention is readily gathered by giving every provision of the instrument its ordinary meaning and effect.”

The plaintiff contended that it was entitled to receive certain sums expended in operating certain oil and gas leases under a contract which provided that defendant should receive one-fourth of seven-eighths of the proceeds until the cost of operations and the production of oil had been recovered by plaintiff, and thereafter one-half of seven-eighths of “all” oil produced. The costs of production having been received by the plaintiff, the court held that the word “all” meant precisely what it said, and:

“Considering the contract as a whole and giving to every provision of the instrument its ordinary meaning and effect we think it clearly appears that the original contracting parties intended that when Smith had been paid in full for all expenses theretofore incurred in developing and operating the leases, out of the $\frac{3}{4}$ of $\frac{7}{8}$ of the oil and gas produced and saved from the premises, thereafter Gulf was entitled to receive $\frac{1}{2}$ of $\frac{7}{8}$ of all oil, gas or other minerals produced and saved from the premises without any deduction from that stated fraction for current operating costs.” (P. 734.)

A. The Evidence Offered Was Not Admissible Even Were the Contract Subject to Interpretation.

The argument on this point is that even had the court held the contract ambiguous—and we have attempted to demonstrate that the court correctly held it was not—the evidence offered by Sheridan was not competent as an aid to construction or interpretation. The rule is that evidence may be offered for the purpose of resolving ambiguity. Such evidence is allowed, not for the purpose of showing the parties intended something other than what they said, but only to show what they meant by what they said.

United Iron Works v. Outer Harbor, etc. Co., 168 Cal. 81;

Kunz v. Anglo London, etc. Bank, 214 Cal. 341;

Barnhart Aircraft v. Preston, 212 Cal. 19.

“No authority sustains the proposition that, under the guise of construction or explanation, a meaning can be given to an instrument which is not to be found in the instrument itself, but is based entirely upon direct evidence of intention independent of the instrument. It has been well said that, in the admission of extrinsic evidence, the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare

the meaning of what is written, and not what was intended to be written.”

6 Cal. Jur., p. 251.

The facts which Sheridan offered to prove [R. 106] could be of no assistance in determining what the parties to the contract meant by what they said. The offer related to:

(a) Prior negotiations between Banks and the attorney for Sheridan.

(b) Evidence of the intention of Banks and Sheridan that Sheridan should receive minimum compensation of \$150,000.00. It is difficult to see how these negotiations, to which RKO was not a party, or the intention of either Sheridan or Banks that Sheridan should receive minimum compensation of \$150,000.00, could aid the court in determining this intention from the language employed in the contract between Sheridan and RKO.

(c) The intention of Sheridan and Banks that minimum compensation should not mean \$50,000.00 but that it was their intention that the phrase would be synonymous with the phrase “flat compensation” and meant \$150,000.00.

The offer of proof indicates that this understanding and intention of Sheridan and Banks was never discussed or related to RKO and, of course, could in no way bind RKO. Further, such evidence does violence to the rule that the court is not interested

in what the parties intended to say, but only what they meant by what they did say.

(d) The officers of RKO understood and the budget prepared by RKO showed that Sheridan was to receive \$150,000.00 and a percentage of the profits.

This is what the contract provides, if Sheridan rendered her services in the picture, and the budget could hardly have been prepared upon any other assumption.

(e) Custom or usage in the motion picture industry to show that under the circumstances of this case minimum compensation meant \$150,000.00.

No such custom or usage was pleaded, and being a custom relating to a particular trade, no evidence thereof was admissible in the absence of such pleading.

Pray v. Trower Lumber Co., 101 Cal. App. 482, 489.

Furthermore, neither custom nor usage could be relied upon if in conflict with the terms of the contract.

New York PRC v. Bach, 2 Cal. 2d 384-394.

The relation of the offer of proof to the circumstances of this case clearly indicates not an offer to prove a general meaning attributed by the motion

picture trade to the words "minimum compensation" but only a meaning under the particular circumstances of this case including negotiations between Sheridan and Banks which were not binding upon RKO and with which there is no offer to charge RKO with notice—in fact the allegation is that such negotiations were never discussed with RKO.

It is respectfully submitted that the rulings of the court below from which this appeal is taken were correct and should be affirmed.

Respectfully submitted,

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No. 12927

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANN SHERIDAN,

Plaintiff, Appellee and Cross-Appellant,

vs.

RKO RADIO PICTURES, INC., a Delaware corporation,

Defendant, Appellant and Cross-Appellee.

BRIEF OF APPELLEE ANN SHERIDAN.

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BRIEF OF APPELLEE ANN SHERIDAN.

Preliminary Statement.

This brief is in reply to the points relied upon in RKO's Opening Brief.¹

RKO sets forth 14 specifications of error based upon the instructions given by the District Court to the Jury and the District Court's refusal to give certain jury instructions requested by RKO.

RKO contends that the District Court's Instructions A, B, G, H-1, J-1, L, P and Q were erroneous and that

¹Since both parties have appealed, for convenience Ann Sheridan (plaintiff below) is herein referred to as "Sheridan" and RKO Radio Pictures, Inc. (defendant below) is herein referred to as "RKO."

the District Court erred in refusing to give RKO's Requested Instructions 1, 2, 5, 6, 7 and 8. In the final analysis all of the specifications of error rest upon the contention by RKO that the District Court erroneously held that Sheridan was obligated to render her services pursuant to the contract after she approved (a) the script of the screenplay, (b) John Cromwell, Robert Stevenson or H. C. Potter to act as director and (c) Robert Young as the actor to portray the leading male role in "Carriage Entrance."

If said contention of RKO is not well taken, then all of the 14 specifications of error relied upon by RKO are not well taken.

In support of the contention that Sheridan was never obligated to render services, RKO argues that although Sheridan approved Robert Young as the actor to portray the leading male role, she did not approve the actor to portray the leading male role because the letter of approval (prepared by RKO) left RKO an "out" by providing that RKO was not obligated to assign the role to Robert Young. The fallacy of RKO's argument is that it rests upon the proposition that an "approval" is not an "approval."

Statement of the Case.

A. Statement of the Facts.

Cross-Appellant Sheridan's Opening Brief contains a statement of the facts relating to the points relied upon by Sheridan in connection with her appeal. (Sheridan's Op. Br. pp. 2-4.) We herein set forth certain additional facts relating to RKO's appeal.

Pursuant to the contract between the parties [Pltf. Ex. 1], Sheridan obligated herself to render her services for RKO in the production of the motion picture "Carriage Entrance"; including the obligation "to appear, assist and take part in tests, wardrobe fittings, conferences, publicity interviews, rehearsals, still photographs and the like in connection with Carriage Entrance . . ." [Pltf. Ex. 1; pars 1 and 12; Sheridan's Op. Br. App. pp. 1-2, 7.]

Paragraph 1 of the contract provided that Sheridan "would not be required to render any services pursuant hereto unless and until she has approved each and all of the following:

"(a) The final shooting script of the screenplay for Carriage Entrance;

"(b) The director who will direct Carriage Entrance; and

"(c) The actor who will portray the leading male role in Carriage Entrance." (Sheridan's Op. Br. App. p. 1.)

Paragraph 1 of the contract provided that Sheridan had already approved the script of "Carriage Entrance." (Sheridan's Op. Br. App. pp. 1-2.)

In order to make sure that Sheridan would be obligated and bound to render her services pursuant to the contract, RKO had Sheridan execute and deliver a letter [Pltf. Ex. 2] concurrently with the execution and delivery of the contract, whereby Sheridan approved the director and the actor to portray the leading male role. Although this letter was addressed to RKO and signed by Sheridan, it was prepared by RKO. [R. 41, 42-43, 89-91.]

Said letter, which is also dated April 29, 1949, reads:

“Gentlemen:

“Please refer to the agreement between us dated April 29, 1949, relating to my employment by you in connection with your motion picture now entitled ‘Carriage Entrance,’ which agreement is being entered into concurrently herewith.

“This will confirm that I have approved and hereby approve any of the following individuals to act as the director of ‘Carriage Entrance’:

“John Cromwell,

“Robert Stevenson,

“H. C. Potter.

“You shall not be obligated to assign any of these individuals to direct the Picture, but any other individuals proposed by you to direct the Picture shall be subject to my approval, as set forth in Article 1 of said employment agreement.

“This will also confirm that I have approved and hereby approve Robert Young to portray the leading male role in ‘Carriage Entrance.’ You shall not be obligated to assign him to portray the leading male

role in the Picture, but any other individual proposed by you to portray the leading male role in the Picture shall be subject to my approval, as set forth in Article 1 of said employment agreement.

“Dated April 29, 1949.

“Yours very truly,

“Ann Sheridan.” [R. 89-91.]

Therefore, as of April 29, 1949, the date the contract between the parties was executed, Sheridan was obligated to render her services pursuant to said contract. In fact, RKO refused to sign the contract until Sheridan had exercised all of the approvals granted her in the contract.

In the Pre-Trial Stipulation, the parties stipulated that when the contract between the parties was executed and delivered, Sheridan had approved (a) the script for the screenplay, (b) the director and (c) Robert Young as the actor to portray the leading male role. [R. 42-43.] Moreover, it should be noted that although the approval of the director was in the same form as the approval of the leading actor, RKO does not contend that Sheridan did not become obligated to render her services by reason of the fact that RKO was not required to assign the named individuals as director or that the approval of director was not binding upon Sheridan by reason of that fact.

The fact that RKO prepared the documents in such a manner so as not to obligate itself to assign one of the directors and the actor proposed by it and approved by Sheridan does not alter the fact that concurrently with the execution of the contract, Sheridan approved the 3 matters over which she had the right of approval and

thereby became obligated and bound to render her services pursuant to the contract.

Based on these stipulated facts, the District Court properly held that Sheridan did obligate herself and became bound on April 29, 1949, to render her services in "Carriage Entrance" and submitted to the jury the question of fact as to whether Sheridan did render any services to RKO pursuant to the contract.

The parties have also stipulated that the term of Sheridan's employment under the contract commenced July 6, 1949. [R. 43.] Robert Young did not refuse the role until July 11, 1949. [R. 43-44.] Sheridan was therefore bound to and did render services after the active commencement date of the term during which RKO had the right to require such services. From July 6, 1949 to August 16, 1949, Sheridan rendered services in connection with the production of "Carriage Entrance," required by the contract to be rendered by her and which services RKO requested her to render.

1. Sheridan conferred with the costume designer to discuss the costumes to be worn by Sheridan in "Carriage Entrance" and to examine the sketches of such costumes. [R. 121, 378.]

2. Sheridan reported to RKO for fittings of 13 costumes made for Sheridan's use in "Carriage Entrance." [R. 121-122, 378.]

3. Sheridan reported to RKO for discussions with RKO employees with reference to Sheridan's make-up and hair dress in the motion picture. [R. 116-117, 122, 377-378.]

4. Sheridan reported to RKO for conferences with RKO executives and employees concerning revisions of the screenplay. [R. 91-93.]

After April 29, 1949, RKO caused the script for "Carriage Entrance" to be revised. [R. 43.] When the revised script was submitted to Robert Young, he rejected the leading male role. [R. 43-44.] Thereafter, at the request of RKO, Sheridan came to the studio for conferences with executives of RKO on numerous occasions between July 11, 1949, up to and including August 16, 1949, for the purpose of discussing with RKO proposed substitutes for Robert Young as the actor to portray the leading male role in the motion picture. [R. 94, 96-98, 99-100, 101-102, 114-116, 117-122, 123-125, 126-128, 128-131, 257-265.]

On August 15, 1949, Sheridan sought and secured an interview with Howard R. Hughes, Managing Director-Production of RKO, at which time Sheridan requested the selection and designation by RKO of an actor. At that time Sheridan informed Mr. Hughes of her prior request for Robert Mitchum as the actor to portray the leading male role, a request which had been refused by RKO. Mr. Hughes again refused to assign Robert Mitchum to portray the leading male role in "Carriage Entrance." Mr. Hughes requested that Sheridan continue her cooperative conduct and again examine motion pictures of Robert Ryan, Mel Ferrer and Robert Preston, which actors had been suggested by RKO as possible substitutes for Robert Young. [R. 125-128, 418-419, 445-448.]

On August 16, 1949, Sheridan viewed motion pictures showing the three last named actors and reported to the

executives of RKO that in her opinion none of these actors would be properly cast in that role. [R. 128-129.] There were further discussions on August 16, 1949, of actors to replace Robert Young but no decision was reached. [R. 128-131.]

RKO then abruptly ended the discussions by sending to Sheridan a written notice, dated August 17, 1949, in which RKO stated that it would not utilize Sheridan's service in "Carriage Entrance" and would not pay any compensation to her. This written notice is Plaintiff's Exhibit 6. [R. 44, 132-134.]

Shortly thereafter RKO did produce "Carriage Entrance" and assigned Robert Mitchum to portray the leading male role and substituted Ava Gardner in place of Sheridan. [R. 44-45.]

B. Analysis of RKO's Specifications of Error.

RKO assigns as error the giving of Court's Instructions A, B; G, H-1, J-1, L, P and Q. [R. 587-588, 588-589, 591, 592, 592-593, 593-594, 595, 595-596.] RKO's objection to each of the above instructions is based on the contention that Sheridan was not obligated to render her services pursuant to the contract.

(1) RKO excepted to that portion of the Court's Instruction A which reads:

"* * * This action presents the question as to whether plaintiff, prior to the termination of her employment by defendant, after approving Robert Young as an actor to portray the leading male role, rendered services to defendant RKO; * * *"
[R. 588.]

RKO objects to this instruction on the ground that Robert Young was never approved as the actor to portray the leading male role and that Sheridan never became obligated to nor rendered services pursuant to the contract. [R. 570-571; RKO's Op. Br. p. 6.]

(2) RKO's exception to Court's Instruction B was on the ground that the District Court incorrectly held that Sheridan was obligated to render her services under the contract. [R. 571; RKO's Op. Br. p. 7.]

(3) Similarly, RKO's exception to Court's Instruction G was on the ground that entirely apart from paragraph 29 of the contract, Sheridan never became obligated to render her services under the contract. [R. 572; RKO's Op. Br. p. 8.]

(4) RKO did not object to that portion of Court's Instruction H-1 which limited Sheridan's recovery to \$50,000 plus interest. The exception to this instruction is based on the contention that the instruction assumes that Sheridan became obligated to render services on April 29, 1949, when she approved Robert Young as the actor to portray the leading male role, which RKO contends is not the case. [R. 572-573; RKO's Op. Br. pp. 8-9.]

(5) RKO's exception to Court's Instruction J-1 is based on its exception to Court's Instructions A and H-1, discussed above. [R. 573; RKO's Op. Br. p. 10.]

(6, 7 and 8) The objections to Court's Instructions L, P and Q relate back to Court's Instructions A and H-1 and RKO's contention that the District Court should not have instructed the jury that Sheridan was obligated to render her services pursuant to the contract. [R. 573; RKO's Op. Br. pp. 11-12.]

As noted in the Preliminary Statement herein, all of RKO's exceptions to the instructions given to the jury are based on the contention that the District Court erred in holding that Sheridan was obligated and bound to render her services pursuant to the contract.

(9, 10, 11, 12, 13 and 14) RKO's specifications of error relating to the Court's refusal to give RKO's Requested Instructions 1, 2, 5, 6, 7 and 8 do not raise any additional questions. [R. 573-575; RKO's Op. Br. pp. 12-17.] The jury instructions given by the District Court cover all of the points upon which RKO desired to have the jury instructed except that the District Court refused to adopt RKO's theory of the case insofar as it maintained that Sheridan was not obligated to render her services pursuant to the contract. [R. 57-68, 587-598.]

C. Statement of Questions Presented by RKO's Appeal.

Although there are 14 specifications of error claimed by RKO, only one question is presented, to wit, did the District Court err in holding that when Sheridan approved (1) the script, (2) the director and (3) Robert Young as the actor to portray the leading male role in "Carriage Entrance," she became obligated and bound to render her services pursuant to the contract?

Point II of RKO's Opening Brief relates to the obligation of both parties to act in good faith. (RKO's Op. Br. pp. 26-27.) However, no contention is made that the District Court did not properly and adequately instruct the jury on the implied covenant of good faith. [See R. 593, 595-598.]

ARGUMENT.

I.

On April 29, 1949, Sheridan Obligated Herself to Render Services Pursuant to the Contract Commencing July 6, 1949.

RKO bases Point I of its opening brief argument on the proposition that when a contractual right is subject to a condition precedent, that right does not accrue when the event upon which performance is conditioned does not occur through no fault of the promisor; citing *Van Orden v. Metson*, 75 Cal. App. 2d 595, 171 P. 2d 485; *Cantwell v. Gage*, 111 Cal. App. 209, 295 Pac. 375; *Lynch v. Keystone Consol. Mng. Co.*, 163 Cal. 690, 126 Pac. 968. (RKO's Op. Br. pp. 19-25 at p. 25.)

We agree that this is the law but submit that this legal proposition, and the cases cited by RKO in support thereof, have no application to the case at bar.

RKO contends that the condition precedent to Sheridan's right to receive compensation is established by paragraph 1 of the contract granting Sheridan certain approvals and paragraph 29 of the contract which provides, in part, as follows:

“* * * However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder.”

On pages 19 to 25 of its opening brief, RKO sets forth its version of the evidence. While we do not agree with the conclusions drawn from the evidence as set forth

therein, we think that it is unnecessary to detail our disagreement since RKO does not deny that concurrently with the execution and delivery of the contract Sheridan approved the three items specified in paragraph 1; in fact, RKO has stipulated that such is the fact. [R. 42-43.]

It is true that the contract provided that before Sheridan became obligated to render services, there was an event which had to occur, namely, Sheridan's approval of (1) the script, (2) the director and (3) the actor to portray the leading male role in "Carriage Entrance." But it is also true that RKO was not willing to obligate itself to the contract without first taking action to remove the condition precedent by having Sheridan, concurrently with the execution of the contract, exercise the 3 approvals granted to her by paragraph 1 of the contract.

In view of the stipulated fact that Sheridan had exercised the 3 approvals, the District Court was required to hold and instruct the jury that on April 29, 1949, Sheridan obligated herself to render services. To adopt RKO's theory of the case, the District Court would have been required to hold that an "approval" is not an "approval."

The fact that on July 11, 1949, through no fault of Sheridan's but because Robert Young did not approve the script as revised by RKO, Young refused the leading male role does not alter the fact that on April 29, 1949, Sheridan was obligated to render services and rendered services pursuant to the contract from the time her term of employment started on July 6, 1949, until August 16, 1949, when RKO abruptly terminated the contract.

The right not to pay compensation given to RKO by the second sentence of paragraph 29 of the contract was dependent on two contingencies:

(1) If Sheridan did not approve any one or more of the items specified in paragraph 1, and did not become obligated to render any services pursuant to the contract; and

(2) If Sheridan did not render any services pursuant to the contract.

It was impossible for the first contingency to occur because admittedly the three items specified in paragraph 1 of the contract were approved by Sheridan concurrently with the execution of the contract.

The District Court properly submitted to the jury the question of fact raised by the second contingency, namely, whether Sheridan had rendered services pursuant to the contract.

The two contingencies excusing RKO from payment of compensation had to be present before RKO could rely on the second sentence of paragraph 29 of the contract. Aside from the fact that the parties stipulated that the first contingency was eliminated by Sheridan's approvals made concurrently with the execution of the contract, the jury, by rendering its verdict for Sheridan, held that Sheridan did render services pursuant to the contract. The happening of either contingency made the second sentence of paragraph 29 inoperative.

II.

**The Jury Was Properly Instructed as to the Implied
Covenant of Good Faith.**

Point II of RKO's Opening Brief is devoted to a discussion of the covenant of good faith implied in every contract and cites *Universal Sales Corp. v. Calif. Press Mfg. Co.*, 20 Cal. 2d 751, 128 P. 2d 665, and *Nelson v. Isaac Abrahams*, 29 Cal. 2d 745, 177 P. 2d 931. (RKO's Op. Br. pp. 26-27.)

Both parties and the District Court agreed that Sheridan and RKO had to act in good faith and the District Court so instructed the jury. In Court's Instructions K and T the jury was fully instructed as to the implied covenant of good faith and the definition of "good faith." [R. 593, 597-598.] Court's Instruction K is taken verbatim from RKO's Requested Instruction No. 3 except for certain very minor language changes. [R. 59-60.] RKO did not object to Court's Instruction T which ably defines "good faith."

RKO also makes the point that the selection of an actor was the right and duty of RKO, that Sheridan could only approve or disapprove and that Sheridan had no right to select or propose an actor but only the right to pass judgment on those selected or proposed by RKO. (RKO's Op. Br. p. 27.) On this score RKO has no complaint since the District Court so instructed the jury. [Court's Inst. L; R. 594.]

The evidence shows that in the effort to arrive at a substitute for Robert Young, Sheridan suggested Robert

Mitchum, an actor under contract to RKO, but was informed that he was not available. Shortly after RKO discharged Sheridan, Mitchum was assigned to the leading male role. While it is true that RKO had the right to select the actor subject to Sheridan's approval, the single fact that RKO assigned the role to Mitchum after discharging Sheridan is ample evidence to support the finding that RKO did not act in good faith.

RKO also states:

"* * * The controversy arose entirely from the insistence of plaintiff that she should have the final say as to any actor defendant proposed for the role—a right which plaintiff demanded despite the fact that it would seem reasonably certain that since defendant was investing more than a million dollars in the picture, it would select no actor who was not clearly competent and qualified. * * *" (RKO's Op. Br. p. 26.)

We disagree with this statement which finds absolutely no support in the record. The implication contained therein is that Sheridan acted unreasonably in the matter of selecting a substitute actor. Sheridan approved Robert Young. Sheridan informed the executives of RKO that many of the actors mentioned in the discussions of a replacement for Robert Young were acceptable to her. Aside from the Mitchum situation, one of RKO's executives suggested Franchot Tone whom Sheridan approved but Tone was never assigned to the role. [R. 43, 90-91, 99-102, 115-116, 124-125, 127-128, 129-130, 131, 149-150.]

III.

The District Court Properly Submitted to the Jury the Issue of Whether Sheridan Rendered Services Pursuant to the Contract; the District Court Did Submit to the Jury the Issue of Whether the Parties Exercised Good Faith in Attempting to Reach an Agreement on a Substitute for Robert Young.

In Point III, RKO argues that the District Court should not have submitted to the jury the issue of whether Sheridan rendered services pursuant to the contract, but should only have submitted the issue of whether RKO acted in good faith in proposing a substitute for Robert Young and whether Sheridan exercised good faith in the matter. (RKO's Op. Br. pp. 28-29.)

RKO terminated the contract on August 17, 1949, without payment of any compensation whatsoever to Sheridan or a tender of payment. RKO claimed the right to do so by reason of the second sentence of paragraph 29. Sheridan contended that this provision of the contract was not operative if Sheridan made the approvals granted her by paragraph 1 of the contract *or* if Sheridan rendered services pursuant to the contract. The District Court did not accept this interpretation of the contract but held that the provision was not operative if Sheridan made the approvals *and* rendered services pursuant to the contract.

The parties stipulated that when the contract was executed and delivered Sheridan made the necessary approvals. [R. 42-43.] Under Sheridan's theory of the case this is sufficient to hold that the second sentence of paragraph 29 never became operative. However, since the District Court held that RKO was not required to pay compensation unless Sheridan made the approvals *and* rendered

services, the issue of whether Sheridan rendered services was submitted to the jury.²

RKO contends that most of the evidence tendered by the parties related to the issue of good faith and therefore this is the issue which should have been submitted to the jury. (RKO's Op. Br. p. 29.) While it may be true that most of the evidence related to the issue of good faith, this does not mean that said issue was the only issue in the case.

Sheridan introduced evidence as to the services rendered by her pursuant to the contract. Due to the use of the federal pre-trial procedure, it was unnecessary to introduce evidence of facts as to which the parties were able to stipulate—such as the stipulation that when the contract was executed and delivered Sheridan had approved (a) the script, (b) the director and (c) Robert Young as the actor who would portray the leading male role in "Carriage Entrance."

The District Court properly instructed the jury that after it had disposed of the issue of whether RKO had the right pursuant to paragraph 29 not to pay Sheridan any compensation whatsoever, it should address itself to the good faith issue.

²It should also be noted that under Sheridan's theory of the case, the fact that Sheridan rendered services pursuant to the contract is sufficient to hold that the second sentence of paragraph 29 is inoperative. Therefore, even if RKO is correct in its position that the approval of the leading actor was never made, the jury's finding that Sheridan rendered services pursuant to the contract is sufficient to support its verdict.

IV.

**The Charge of the District Court Was Not Erroneous
in the Particulars Which RKO Assigns as Error.**

Court's Instruction A.

[R. 587; RKO's Op. Br. pp. 4-6, 30-31.]

RKO objects to Court's Instruction A on the ground that it instructs the jury that Sheridan became bound to render services pursuant to the contract when she approved Robert Young.

The contract obligated Sheridan to render her services except that paragraph 1 provided that she was not required to do so unless and until she approved the 3 items specified therein. When Sheridan approved the 3 items on April 29, 1949, she had done all that was necessary to obligate herself to render the services required of her under the contract.

RKO contends that Sheridan's approval of Robert Young was "conditional." The approval of Young was not conditional insofar as Sheridan was concerned. By exercising the approvals she became obligated to render her services and did render services after the term of the contract commenced on July 6, 1949, and before and after Robert Young's refusal to perform the role.

It is interesting to note that the language used by RKO in Plaintiff's Exhibit 2 as to the approval of a director is the same as the language used as to the approval of Robert Young. RKO does not contend that because of such language Sheridan was not bound by her approval of a director; and RKO has stipulated that by said letter Sheridan approved the director.

Court's Instruction B.

[R. 588; RKO's Op. Br. pp. 6-7, 31-33.]

RKO objects to that portion of Court's Instruction B which states that on April 29, 1949, Sheridan obligated herself to render services. The objection to this instruction is the same as RKO's objection to Court's Instruction A. Our answer is the same—on April 29, 1949, when Sheridan executed the contract and exercised the 3 approvals, she did become obligated to render her services.

Court's Instruction G.

[R. 591; RKO's Op. Br. pp. 7-8, 33-34.]

RKO relies on the second sentence of paragraph 29 as the provision of the contract which entitled it to terminate without payment of compensation to Sheridan. In light of that fact, it is patent that RKO has no standing to object to Court's Instruction G which instructs the jury that "issues arising under paragraph 29 of the contract" is one of the three parts of the case which the jury must consider.

This instruction was in favor of RKO and against Sheridan since it is Sheridan's contention that, based on the stipulated facts, the District Court should have instructed the jury that RKO could not rely on paragraph 29.

In so far as RKO objects to the instruction on the ground that the District Court should have held and instructed the jury that Sheridan never became obligated to render her services, the objection is the same as RKO's objection to Court's Instructions A and B.

Court's Instruction H-1.

[R. 592; RKO's Op. Br. pp. 8-9, 34-40.]

RKO contends that Court's Instruction H-1 was a formula instruction and sets forth certain rules of law relating to formula instructions.

Court's Instruction H-1 informed the jury as to the sole issue of fact arising under paragraph 29 of the contract and instructed the jury that their verdict must be for Sheridan if they decided this issue in her favor. This instruction was not a "formula" instruction within the concept of "formula" instructions discussed in the cases cited by RKO.

A brief review of the cases cited by RKO discloses that the objections to the instructions given in those cases are not objections applicable to the instructions given herein.

In *Mazzotta v. L. A. Ry. Corp.* (1944), 25 Cal. 2d 165, 153 P. 2d 338, the trial court instructed the jury in a personal injury action that if it found defendant could have avoided accident by using ordinary care, then it should find for plaintiff. The appellate court held the instruction was erroneous because the trial court should have required the jury to find not only that defendant was negligent, but that plaintiff was damaged as a proximate consequence of defendant's conduct.

In *La Rue v. Powell* (1935), 5 Cal. App. 2d 439, 42 P. 2d 1063, a similar instruction was held erroneous because of the omission of the elements of proximate cause and contributory negligence.

In *Keller v. Pac. Tel. & Tel. Co.* (1934), 2 Cal. App. 2d 513, 38 P. 2d 182, the trial court erroneously instructed the jury to find for plaintiff if defendant permitted his car

to go on the curb, without reference to whether or not the defendant negligently permitted his car to do so.

Sinan v. A. T. & S. F. Ry. Co. (1930), 103 Cal. App. 703, 284 Pac. 1041, was also a personal injury action and arose out of a train wreck caused by a defective switch. The trial court instructed the jury that if the defective switch was caused by third parties not employed by defendant, a verdict in favor of defendant should be returned. The instruction was held to be erroneous because it omitted the question of possible liability on the ground that defendant was negligent in not using diligence to discover the defective switch in time to avert the accident.

In *Starr v. L. A. Ry. Co.* (1921), 187 Cal. 270, 201 Pac. 599, the trial court instructed the jury to find for plaintiff in a personal injury action if it found a certain set of facts to be true. The instruction was erroneous because the instruction omitted elements requisite to a finding of proximate cause.

The issue presented in *Pierce v. United Gas & Electric Co.* (1911), 161 Cal. 176, 118 Pac. 700, was whether defendant was liable for the death of two children electrocuted while playing with a guy wire from defendant's transmission lines which had come loose. The guy wire did not contain electric current but the children were electrocuted when they brought the guy wire into contact with one of the power lines. The trial court instructed the jury to render a verdict for plaintiffs if it found: (1) that electricity is highly dangerous and a subtle instrument of death; (2) that defendant conducted high currents along public streets; (3) that defendant "maintained" a guy wire without insulation lying in the street in such a manner that children might draw it against electric

wires; and (4) that the children were not guilty of contributory negligence.

The Supreme Court of California held that this instruction was erroneous because the word "maintained" eliminated the question of whether the defendant should have discovered the loose guy wire as an element of determining negligence. The instruction was also held to be erroneous because it omitted submitting to the jury the question of whether the loose wire was likely to attract children to play with it and whether in such play it could be reasonably anticipated that the guy wire would be brought into contact with an electric wire.

These cases cited by RKO are all personal injury cases in which the instruction held erroneous was one in which the jury was instructed that if they found certain facts to be true, they must render a verdict for a designated party.³

In each instance more than one question of fact had to be resolved in order to determine liability and error was committed by the failure to submit to the jury one or more of such questions.

Court's Instruction H-1 was not a "formula" instruction. This instruction did not seek to set out the exact facts the jury had to find before it could render a verdict that Sheridan had rendered services pursuant to the contract. The District Court simply told the jury what issue had to be decided in order to determine whether RKO

³RKO also cited *Taha v. Finegold* (1947), 81 Cal. App. 2d 536, 184 P. 2d 533. In this case the appellate court held that the formula instruction complained of was not prejudicial by itself but reversed a verdict for defendant in a personal injury action due to repetitious instructions in favor of defendant.

could rely on the second sentence of paragraph 29 of the contract. The instruction did not omit any elements essential to determine RKO's right not to pay Sheridan any compensation whatever under the contract.

RKO also cites 24 Cal. Jur. 841, sec. 101; *Ryan v. L. A. I. & C. S. Co.* (1896), 112 Cal. 244, 44 Pac. 471; *Vinther v. Sunset Mutual, etc. Co.* (1916), 11 Cal. App. 2d 118, 53 P. 2d 182; *Clark v. Volpa Bros.* (1942), 51 Cal. App. 2d 173, 124 P. 2d 377, as authority for the proposition that an instruction is erroneous if it assumes the existence of a fact not in evidence.

These authorities are not applicable. The instruction stated that on April 29, 1949, Sheridan approved Robert Young as the actor for the leading male role. The parties stipulated that Sheridan did so. The District Court then properly held that by reason of Sheridan's exercise of the approvals she became bound to render her services to RKO.

RKO contends that Sheridan's activities in connection with "Carriage Entrance" did not constitute performance of services pursuant to the contract. This contention finds no support in the record. There is ample evidence to sustain the verdict that Sheridan did render services pursuant to the contract.

RKO also contends that the District Court nowhere told the jury "whether services of the nature indicated were services 'rendered pursuant to the contract.'"

This contention completely ignores the fact that the jury had before it the contract and in the preceding instruction. [Court's Instruction I-1] the District Court told the jury that in determining whether or not Sheridan rendered services pursuant to the contract, they could

wires; and (4) that the children were not guilty of contributory negligence.

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This contention completely ignores the fact that the jury had before it the contract and in the preceding instruction. [Court's Instruction I-1] the District Court told the jury that in determining whether or not Sheridan rendered services pursuant to the contract, they could

consider the provisions of paragraphs 4 and 12 of the contract. [R. 591-592.]

RKO's position is inconsistent in that it first complains that Court's Instruction H-1 is a "formula" instruction and next complains that the instruction was erroneous because it did not spell out the exact facts the jury had to find before it determined that Sheridan rendered services pursuant to the contract.⁴

Although much of RKO's argument is devoted to a discussion of formula instructions, the basic objection to Court's Instruction H-1 is based on RKO's contention that the District Court should not have instructed the jury that on April 29, 1949, Sheridan became bound to render her services to RKO. The fallacy of RKO's contention is demonstrated by contradicting RKO's unfounded remark that it is an "undisputed fact that plaintiff never approved an actor to portray the role . . ." (RKO's Op. Br. p. 39.) To the contrary, the parties stipulated that on April 29, 1949, Sheridan approved Robert Young to portray the leading male role and exercised the other approvals granted her in paragraph 1 of the contract.

⁴If the District Court had given a "formula" instruction which set out the detailed facts which had to be found in order to determine that Sheridan rendered services, the District Court would have had to run the risk of giving an erroneous instruction by omitting a set of facts which could be considered as services rendered pursuant to the contract.

Compare *Stein v. Lacassie* (1922), 189 Cal. 118, 207 Pac. 886, cited by RKO, in which the trial court committed error in instructing the jury as to "probable cause" in an action for malicious prosecution. The jury was told that unless it found defendant acted pursuant to advice of his own counsel or of the district attorney, after fully and fairly stating the facts to them, then the defendant was liable. The appellate court held that the instruction was erroneous because it was possible for the jury to find that defendant had abundant cause for procuring plaintiff's arrest regardless of the advice of counsel.

Court's Instruction J-1.

[R. 592; RKO's Op. Br. pp. 9-10, 41.]

RKO's objection to Court's Instruction J-1 was made upon all the grounds assigned by RKO for the objections to Court's Instructions A and H-1. Since we have replied to RKO's objections to Court's Instructions A and H-1, we need not further burden the Court by repeating our refutation of those objections.

Court's Instructions L, P and Q.

[R. 593, 595; RKO's Op. Br. pp. 10-12, 41-44.]

RKO's objections to Court's Instructions L, P and Q are based on the fact that the Court previously instructed the jury to render a verdict for Sheridan if they determined that she rendered services under the contract and the Court's refusal to instruct the jury "that if in good faith the defendant proposed an actor to portray the leading male role in the picture and plaintiff failed to approve said actor after reasonable opportunity so to do, *plaintiff never became obligated to render her services pursuant to the contract* and could not recover in the action." (RKO's Op. Br. p. 42; emphasis supplied.)

If Court's Instructions A, B, G, H-1 and J-1 are not erroneous, then Court's Instructions L, P and Q are not erroneous.⁵ No purpose will be served by repeating our argument that the first mentioned instructions were not erroneous in the particulars assigned by RKO.

⁵The last paragraph of Court's Instruction L is RKO's Requested Instruction No. 4. [R. 60-61, 593.]

RKO's Requested Instructions Nos. 1, 2, 5, 6, 7 and 8.
[R. 57-59, 61-63; RKO's Op. Br. pp. 12-17, 44-46.]

RKO's assignment of errors based on the District Court's refusal to give RKO's Requested Instructions Nos. 1, 2, 5, 6, 7 and 8 raises the same question raised by RKO's previous specifications of error. The essential contention is that Sheridan never approved an actor to portray the leading male role and that she did not become obligated on April 29, 1949, to render her services to RKO. Further discussion of these contentions in this brief is not warranted.

In determining whether the District Court erred in refusing to give the instructions requested by RKO, certain well established rules of law relating to jury instructions should be considered.

(1) “. . . It is the duty of a trial court to refuse requested instructions which incorrectly state the law applicable to the evidence and issues. The rule is the same where a requested charge is merely erroneous in part, for the court is not required to modify requested instructions or give others in lieu thereof if the jury is properly instructed as to the law of the case.” (24 Cal. Jur., Trial, pp. 803-804, Sec. 77.)

Also see:

Nelson v. Southern Pacific (1937), 8 Cal. 2d 648,
67 P. 2d 682;

Hart v. Farris (1933), 218 Cal. 69, 21 P. 2d 432;

Johnson v. Southern Pacific (1930), 105 Cal. App.
340, 288 Pac. 81.

(2) “. . . it is not error for a court to refuse to give a requested instruction if the subject matter thereof is substantially incorporated in the instructions given. A party is not entitled to have the jury instructed in any particular phraseology, and may not complain on the ground that his requested instructions are refused if the court, on its own motion or otherwise, correctly announces the substance of the law applicable to the case; this is true even though the requested charges state the principles involved more clearly and definitely than those given.” (24 Cal. Jur., Trial, pp. 806-810, Sec. 79.)

Also see:

Estate of Nelson (1923), 191 Cal. 280, 216 Pac. 368;

Estate of Walker (1919), 180 Cal. 478, 494, 181 Pac. 792;

Kahn v. Triest-Rosenberg Cap. Co. (1903), 139 Cal. 340, 348-349, 73 Pac. 164;

Merguire v. O'Donnell (1894), 103 Cal. 50, 36 Pac. 1033;

Mullanix v. Basich (1945), 67 Cal. App. 2d 675, 155 P. 2d 130, 133;

Dawson v. Boyd (1943), 61 Cal. App. 2d 471, 143 P. 2d 373, 379.

The first rule stated is applicable to each of said instructions requested by RKO as all of the instructions are based in whole or in part on RKO's incorrect contention that Sheridan was not bound to render her services to RKO when she exercised the three approvals granted her by the contract.

As to the second rule of law, a comparison of RKO's Requested Instructions to the instructions ultimately given by the District Court discloses that insofar as the requirement of good faith in selecting a substitute actor is involved in this case, the District Court adopted RKO's theory of the case. [R. 57-68, 581-604.]

Conclusion.

RKO relied on the second sentence of paragraph 29 of the contract when it sent Sheridan the letter of termination [Pltf. Ex. 6] and sought to end its obligations under the contract without payment to Sheridan of any compensation.

It is Sheridan's contention that RKO did not have the right to rely on the second sentence of paragraph 29 if Sheridan exercised the approvals granted her by the contract *or* if Sheridan rendered any services to RKO pursuant to the contract.

The District Court held that this provision of the contract granting RKO the right to terminate without payment of compensation was inoperative if Sheridan exercised the approvals *and* rendered services. Based upon that construction of the contract (which was in favor of RKO and adverse to Sheridan), the District Court properly instructed the jury that on April 29, 1949, when Sheridan exercised the 3 approvals, she was obligated to render her services and submitted to the jury the issue of whether Sheridan did render services required of her by the contract.

RKO's specifications of error all necessarily rest upon the argument that an "approval" was not an "approval." Therefore, each of the specifications of error assigned by RKO should be overruled and that portion of the judgment which awards Sheridan \$50,000 plus interest should be affirmed.

Respectfully submitted,

GANG, KOPP & TYRE,

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MILTON A. RUDIN,

By MARTIN GANG,

Attorneys for Appellee, Ann Sheridan.

No. 12927

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANN SHERIDAN,

Plaintiff, Appellee and Cross-Appellant,

vs.

RKO RADIO PICTURES, INC., a Delaware corporation,

Defendant, Appellant and Cross-Appellee.

CROSS-APPELLANT'S REPLY BRIEF.

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CROSS-APPELLANT'S REPLY BRIEF.

Cross-appellant will be referred to as "we" or "Sheridan." Cross-appellee will be referred to as "RKO." Sheridan's opening brief will be referred to as "O.B." and RKO's reply brief as "R.B."

Certain preliminary remarks are required because of the erroneous statements made in RKO's brief to the effect that Sheridan's brief contains references outside the record. (R.B. 3.)

1. The first such assertion attacks the statement that "the lengthy contract was devoted almost entirely to protecting the interests of the employer, RKO."¹ The con-

¹RKO does not contend that this is an incorrect statement of fact. A gratuitous statement is made with reference to fraud, duress, etc., none of which has anything to do with any issue in this case.

tract referred to was introduced in evidence as Plaintiff's Exhibit 1 and is a part of the records and proceedings of this case. [R. 86.] Furthermore, under Rule 18 of this Court exhibits of material forming part of the evidence taken in the Court below are placed in the custody of the Clerk of this Court and are, therefore, at all times available for examination by the Court.

2. RKO makes the statement that no part of the contract is before this Court except the excerpts printed in the appendix to Sheridan's opening brief. (R.B. 3.) As pointed out above, under Rule 18 the contract as Plaintiff's Exhibit 1 is in the custody of this Court. Furthermore, counsel entered into a stipulation in order to avoid encumbering the record with material as to which there was no controversy. [R. 626.] Plaintiff's Exhibit 1 was one of the items mentioned in that stipulation and subsequently this Court on its own motion made an order that Plaintiff's Exhibit 1 need not be printed as part of the printed record. [R. 627.]

Finally, if RKO questioned the accuracy of the statement made with reference to the contract, it could have printed in an appendix to its brief that portion of the contract not printed in the appendix to Sheridan's brief. Significantly RKO failed to do this.

3. The next attack is leveled against the statement that the contract was drafted in its final form by the Legal Department of RKO. (R.B. 3.) Not only is the statement justified in fact, but it appears clearly in the record

as part of Sheridan's offer of proof. Therein the following language appears:

“* * * that the contract dated April 29, 1949, was prepared by the legal department of defendant.” [R. 107.]

Defendant, of course, is RKO.

“* * * *it is a fact that the interlineations were made by the legal department of defendant in preparing the document which subsequently was executed by the plaintiff and defendant.*” (Emphasis ours.) [R. 109.]²

Finally, in preparing the document in its final form for submission to Sheridan it put its own caption at the head of the document “RKO Radio Pictures” which may be seen by an examination of that portion printed in Sheridan's brief. (O.B. Appendix 1.)

It is regretted that space had to be devoted to show that all of the statements objected to were true and correct.

²The request by RKO (R. B. 4) for permission to go outside the record was unnecessary since all of the facts related by it and more appear in the record. [R. 107-109 and Pre-trial Stipulation III, Points 14, 15, 16 and 17, R. 45-46.]

³RKO'S SUMMARY OF THE ARGUMENT.

At the inception RKO illustrates the error which permeates its brief. After itemizing three points, RKO proceeds to interpret the contract by adding words which do not appear therein.

Thus, RKO states that its right to perform by payment of minimum compensation to Sheridan "was a valid *imitation of liability* available under all circumstances if the services of Sheridan were not used *in the picture* or the picture was not completed *with Sheridan appearing therein*." (Emphasis ours.) (R.B. 5.) An examination of Paragraph 29 which is printed on page 8 of RKO's brief, shows that each of the phrases underlined in the preceding quotation does not appear therein.

Paragraph 29 says nothing whatever about limiting liability, but gives RKO the right to make alternate performance by payment of compensation less than would be required if full performance were made by Sheridan if either of the two contingencies therein provided for arose.

The first sentence nowhere includes in the first contingency the requirement that Sheridan's services be used "in the picture." On the contrary, the word "hereunder" is used and the word "hereunder" refers to use of Sheridan's services pursuant to the contract.

The second contingency relates to the contractual right given RKO not to complete the production of CARRIAGE ENTRANCE. It does not say "with Sheridan appearing therein."

The fundamental error made by RKO is in reading Paragraph 29 which has to do with performance as though it were a clause having to do with breach.

³RKO did not in its brief reply in order to the argument made in Sheridan's brief. In this brief Sheridan will, wherever possible, refer to the headings used in RKO's brief.

I.

CONSTRUCTION OF THE CONTRACT.

A. The Relevant Provisions of the Contract.

In referring to Paragraph 12, RKO adds emphasis to the statement that Sheridan was not entitled to any compensation for the services described therein. (R.B. 7.) This added emphasis is misleading to say the least. An examination of Paragraph 12 clearly indicates that Sheridan is not entitled to compensation for such services only if such services take place "prior to the starting date of said term." (O.B. Appendix 7.) Such services after the starting date of the term are services for which Sheridan was to be compensated under Paragraph 6 of the contract. There should be no implication that the services described in Paragraph 12 were gratuitous except in so far as they took place in the week preceding July 6, 1949.

B. The Provisions Purporting to Limit Compensation.

In its heading RKO recognizes that Paragraph 29 is a clause affecting the amount of *compensation* payable to Sheridan under certain contingencies. In its argument RKO falls into the error mentioned above and treats the paragraph as "limiting damages." (R.B. 8.)

The language of the contract in the *Lorentz* case cited by both Sheridan and RKO (see *e. g.*, O. B. 18) illustrates the difference not only in language but in substance between Paragraph 29 and the clause in the *Lorentz* case. In the *Lorentz* contract the employee expressly gave a waiver and release to RKO from claims or causes of action based on failure of RKO to use the services of the employee or the results thereof or on the failure of RKO

to produce, etc., the picture. In the *Lorentz* contract the clause expressly related to breach or termination and limiting liability by reason thereof. No such language or concept appears in Paragraph 29 of the Sheridan contract.

The facts in the Sheridan case show (a) that RKO actually used the services of Sheridan under the contract; (b) that RKO actually completed the production of *CARRIAGE ENTRANCE*, and (c) that RKO did not pay or tender payment of minimum or any compensation to Sheridan as required under the first sentence of Paragraph 29.

RKO admits that the provisions of Paragraphs 20, 21 and 23 of the contract deal with rights of termination given to RKO. It, however, fails to meet the point made in Sheridan's opening brief (O.B. 14) that RKO knew of all of its needs with reference to its rights of termination. It covered these in the last numbered paragraphs. It did not in Paragraph 29 deal with termination and any construction of Paragraph 29 which would make it a termination paragraph does violence to the entire contract.

It is perfectly understandable that Sheridan might agree to a lesser payment if RKO made no use whatever of her services under the contract. It is likewise understandable that Sheridan might agree to a clause under which she would accept the lesser payment if RKO failed to complete the production of *CARRIAGE ENTRANCE*.

However, for a court to take the language to which Sheridan agreed and to expand it so as to include concepts radically different from those embraced in the language used does amount to working a forfeiture and perpetrating an injustice. The contract as construed by the District Court is not the contract which Sheridan signed.

⁴C. Was the Court Correct in Limiting RKO's Liability Under Paragraph 29?

In this portion of the argument RKO attempts to justify a construction of the contract beyond the language used in the first sentence of Paragraph 29. Paragraph 12 is cited by RKO as the basis for the statement that Sheridan was entitled to no compensation in addition to that provided in Paragraph 6 for services rendered in costume fittings, make-up, hair dressing, etc. (R.B. 14.) This is a completely mistaken reading of that paragraph.

The object of Paragraph 29 was to permit RKO to lessen its financial obligation to Sheridan if either of two contingencies arose. Emphasis must be given to the fact that it was in the complete discretion and control of RKO as to whether either of the contingencies would arise. These contingencies were:

1. Failure to use Sheridan's services "hereunder." The word "hereunder" referred only to the contract and cannot be read to mean "in the picture."
2. Failure to complete the production of CARRIAGE ENTRANCE.

RKO had the contractual right to abandon the production and if it did the first sentence of Paragraph 29 would have become available to RKO for the purpose of lessening its financial obligation to Sheridan. Nowhere in that first sentence does it appear that the phrase "to complete the production of CARRIAGE ENTRANCE" meant or was intended to mean anything else and certainly there is nothing in the first sentence or elsewhere in the con-

⁴There is an arabic 1 but no arabic 2 in this portion of RKO's brief.

tract which permits the addition to that phrase of the language "with Sheridan."

At page 15 of its reply brief RKO makes the parenthetical observation that Sheridan was deprived of the opportunity to exercise and display her talent only because of her refusal to approve any of the persons proposed for the leading male role. Not only does this statement find no support in the record, but the absolute contrary is true as found by the jury in rendering a verdict for Sheridan.⁵

The quotation from the *Lorentz* case at the bottom of page 15 of the reply brief again illustrates the refusal of RKO to face the facts in the Sheridan case. That quotation refers to the fact that in the *Lorentz* case RKO actually discontinued the production. In the Sheridan case not only did RKO not abandon the production, but RKO proceeded to make the picture exactly as planned except for the fact that instead of giving Robert Mitchum

⁵Before RKO would sign the contract it extracted from Sheridan an approval of Robert Young. [R. 43.] Sheridan approved Richard Conte. [R. 100.] Robert Mitchum was suggested by Sheridan. [R. 100.] John Lund was stated to be satisfactory to Sheridan. [R. 100.] Sheridan expressly approved Franchot Tone. [R. 102 and 114.] It was Mr. Howard Hughes, the managing director of RKO, who reversed his subordinates and refused to permit Franchot Tone to play the leading male role. [R. 115.] Sheridan again asked about John Lund, Richard Conte and Robert Mitchum and was informed that none of them was available. [R. 116.] Sheridan, on August 15, 1949, secured an audience with Howard Hughes, the managing director of RKO, and asked him directly for Robert Mitchum as the leading man in *CARRIAGE ENTRANCE*. Sheridan's request was again refused. [R. 127.] The name of Franchot Tone was again presented to the managing director of RKO, who again refused his consent. [R. 127.] On August 16, 1949, Sheridan discussed leading men with Sid Rogell, an executive of RKO and discussed the possibility of Charles Boyer playing the role. [R. 129, 130 and 131.]

to Sheridan as the leading man it supplied Robert Mitchum as the leading man in the picture with a different leading lady.

D. Did RKO Elect Not to Rely on the First Sentence of Paragraph 29?

At no time in Sheridan's argument was there any admission or implication that Paragraph 29 was a clause relating to termination of the contract. On the contrary, it was at all times asserted that Paragraph 29 was a clause which permitted alternate performance as distinguished from other paragraphs of the contract which related to termination.

RKO fails to answer the argument made by Sheridan in the opening brief, page 20 *et seq.*, that performance and breach are entirely inconsistent with each other and that RKO by its notice of August 17, 1949, committed a breach of the contract which deprived it thereafter of the right to perform under the first sentence of Paragraph 29.

Sheridan's promise to accept less than full compensation was conditioned on concurrent performance by RKO of its obligation to pay less than full compensation, or minimum compensation. Performance by RKO of its obligation was required on August 17, 1949, not under the compulsion of a verdict by a jury.

It should be observed that the foregoing argument is completely and specifically supported by the Restatement of the Law, Contracts, by the statutes of the State of California and by the case law on the subject. The statutes and case law are, of course, binding upon this Court.

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938).

Section 344 of the Restatement of the Law, Contracts, Illustration 3, sets forth the law as follows:

“3. In October, A contracts to break up certain prairie land for B by the following July 1, reserving the power to extinguish his duty to do so by paying \$75.00 to B by December 1. This is an alternative contract, but it ceases to be so after December 1. If \$75 has not been paid by that date, A’s duty is to break up the land, and B’s damages are measured by the value of that performance, not by \$75 because A’s failure to perform the earlier alternative is regarded as an election by him of the other one and his power to discharge his duty by paying the money has expired.”

Section 1449 of the Civil Code of the State of California adopts the rule set forth in the Restatement as part of the statutory law of this state. This latter section reads as follows:

“Notice Essential. If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party.”

Two decisions of the California courts express this same thought.

In *Jacobson Reimers Co. v. Tozai Co.*, 42 Cal. App. 178, 183 Pac. 466 (1919), a suit was brought against the defendant for failure to deliver turkeys under a contract which provided for the delivery of “from two hundred head up to twelve hundred between now and Thanksgiving.” The defendants refused to deliver any turkeys what-

soever. The market price had increased over the contract price $14\frac{1}{2}$ cents per pound. The lower court awarded damages for the plaintiff in the sum of \$615.60 based upon the refusal to deliver 1200 turkeys. The defendants contended on appeal that its obligation was limited to the delivery of the minimum of 200 head of turkeys and that the judgment should be reduced to the sum of \$77.60. The Court affirmed the judgment for the plaintiff in the full sum and stated:

“Plainly, the statute gave defendants the right to deliver any number of turkeys from two hundred to twelve hundred ‘between’ the date of the obligation and November 29th. Defendants, admittedly, neither offered to nor did deliver any number of turkeys ‘between now and Thanksgiving,’ or at all, but, as the court found, refused to deliver any. In such case, by the terms of the statute, ‘the right of selection passes to the other party.’ It is not necessary to resort to textbooks or to the decisions of the courts. Sufficient to say, however, that our code states the rule accepted generally by writers upon the law of contracts and by the courts. We agree with the statement made by the learned trial court in the concluding paragraph of his written opinion:

‘In this case there being no pretention that performance was even as much as attempted, it seems that under well-recognized principles of equity the defendant should not be permitted to limit his liability to the minimum delivery required by this agreement. To do so would allow the most flagrant abuse of such an agreement.’ ”

The same result was reached in *Whims v. Marco*, 137 Cal. App. 750, 31 P. 2d 475 (1934). The contract provided that the plaintiff should have a limited time to per-

fect his title and to secure the approval of the Corporation Commissioner. The balance of the purchase price was to be paid within 10 days after notice that this had been accomplished. Defendants had the right to relieve themselves of liability by paying the plaintiff the sum of \$300 upon receipt of this notice. The plaintiff sued in the Superior Court for damages for breach of the contract to purchase the stock. The jurisdiction of the Superior Court was limited at the time to amounts in controversy of \$2,000 or over. A judgment was rendered for the plaintiff. The defendant contended that the Superior Court did not have jurisdiction because the amount in controversy was but \$300. In overruling this contention the District Court of Appeal stated:

“The point arises out of the provision of the contract giving the defendants the right to relieve themselves from liability by paying plaintiff the sum of \$300 upon receipt of notice of plaintiff’s perfection of title. The complaint alleges that the defendants did not pay or offer to pay this sum and the trial court so found. As the contract called for payment ‘forthwith,’ it is evident that, whatever right of election the defendants may have had, they failed to exercise it and plaintiff was entitled to rest on his contract of sale. Section 1449, Civ. Code.”

E. The Wrongful Discharge of Sheridan Subjected RKO to Damages Not Limited to \$50,000.

The jury has found that RKO’s termination of the contract was without cause and wrongful. There is nothing in the contract which justifies the statement by RKO (R.B. 18) that for termination without cause RKO was obligated to pay minimum compensation.

The rest of this portion of RKO's argument is answered elsewhere in this brief.

Sheridan cited from the memorandum of the Honorable District Judge at page 25 of the opening brief because that in the opinion of Sheridan was the correct position. Unfortunately, the Honorable District Judge subsequently changed his position to what Sheridan respectfully submits is an erroneous one.

II.

MINIMUM COMPENSATION DID NOT MEAN \$50,000.00.

RKO's argument in its brief on this particular point is divided into two phases: (1) "minimum compensation" must mean \$50,000.00 because "the only money which Sheridan would certainly receive would be the sum of \$50,000.00 payable during the first week of photography." (R.B. 27.) (2) "minimum compensation" must mean \$50,000.00 because "it would have been a very simple thing if the parties had \$150,000.00 in mind, in paragraph 29, to have said flat compensation for this is the way the sum of \$150,000.00 is designated throughout the contract." (R.B. 29.)

1. The first phase is predicated upon a false assumption. RKO attempts to differentiate the \$50,000.00 payment from the \$100,000.00 and from the percentage because the \$50,000.00 is immutable, whereas the \$100,000.00 and the percentage were dependent upon contingencies. An analysis of the contract will disclose that this is not the case for the following reasons:

(a) The \$50,000.00 was payable "on the first regular weekly pay day after the principal photography of 'Carriage Entrance' has commenced but in no event later

than the seventh day after such photography has commenced.” (O.B. Appendix 3.) This language introduced a contingency, to-wit, this \$50,000.00 payment presupposed that photography of “Carriage Entrance” had commenced. In this respect it is impossible to differentiate the first \$50,000.00 of flat compensation, which under the terms of the contract is payable only after photography of “Carriage Entrance” has commenced, and the \$100,000.00 of the flat compensation which is payable only after certain gross receipts have been received from the motion picture. Both payments are contingent. It is only a question of the extent of the contingency.

Under the language of the contract, *if photography of “Carriage Entrance” was never commenced, the \$50,000.00 payment would never become payable.*⁶ (Emphasis ours.)

(b) The \$50,000.00 payment is not a minimum payment because under certain circumstances the minimum compensation payable to Sheridan even if RKO’s argument be adopted would be in excess of \$50,000.00. This contingency would occur if Sheridan’s services were required for more than 15 weeks. Under paragraph 6 of the contract Sheridan would be entitled to \$10,000.00 a week for the time the term continues beyond 15 weeks. RKO does not deny that under the language of the contract if Sheridan worked for 17 weeks on the picture and if the picture was then abandoned, Sheridan would be entitled

⁶It should be noted that RKO’s argument is based upon the literal language of the contract. Our argument in this portion of our brief, accordingly, is directed to an analysis of this literal language. The fact that we analyze the contract in this manner should not be deemed a waiver by Sheridan of any of Sheridan’s rights under the line of cases of which *Wolf v. Marsh* (1880), 54 Cal. 228, cited on page 12 of O. B. is typical.

to receive \$70,000.00. Accordingly, on its face, RKO's argument that "construing the contract from its four corners, it clearly means the sum of \$50,000.00"⁷ is false.

(c) The smallest amount of compensation that Sheridan might receive under the contract could be less than \$50,000.00. RKO argues that the phrase "minimum compensation" must mean \$50,000.00 because \$50,000.00 was "the minimum compensation which Sheridan would receive were the services of Sheridan used and the production of the picture complete." (R.B. last line p. 27 and first two lines p. 28.) From this RKO argues that the phrase "minimum compensation" has a definite meaning and that "it clearly means the sum of \$50,000.00." However, it is not true that if Miss Sheridan had appeared in the picture the least amount of money that she would have received would have been \$50,000.00. Paragraph 22 of the contract (O.B. Appendix 11) specified that Sheridan would not be entitled to any compensation for any time during which the agreement was suspended. Paragraphs 20 and 21 set forth certain contingencies under which the contract could be suspended, such as act of God, illness of the artist or the refusal of Sheridan. These paragraphs also contain provisions for the prorating of Sheridan's compensation in the event that the above contingencies occurred and the picture was released containing Sheridan's likeness. Thus, under paragraph 22, if Sheridan was able to work for only 4 weeks because of illness but Sheridan appeared in the released version of the picture, her compensation would be prorated at the rate of \$10,000.00 a week, so that she would receive \$40,000.00, *not* \$50,000.00.

⁷This statement appears in the main heading of Point II on page 26 of R.B.

Similarly, if Sheridan had been able to render her services for only 3 weeks, she would have received \$30,000.00, *not* \$50,000.00.

The phrase “minimum compensation” as used in the contract cannot be tied in with the sum of \$50,000.00 upon any theory that the \$50,000.00 was a fixed sum which was certain to be paid or that it was the smallest sum to which the artist would be entitled. Under certain circumstances, the smallest sum to which Sheridan would be entitled would be less than \$50,000.00, under other circumstances it would be more than \$50,000.00, and furthermore, under the literal language of the contract even the sum of \$50,000.00 was contingent upon photography commencing.

2. RKO’s argument that if the draftsman had intended “minimum compensation” to be \$150,000.00, he would have used the language “flat compensation,” is equally susceptible of the conclusion that if the draftsman had intended “minimum compensation” to mean \$50,000.00, he would have used “\$50,000.00” in paragraph 29 instead of the phrase “minimum compensation.”

We concede that the language of paragraph 29 is by no means a model of clarity. Undoubtedly, future paragraph 29s which are drawn by RKO will not use the same terminology. They will specify “flat compensation” when flat compensation is intended, and they will specify “\$50,000.00” if, as and when \$50,000.00 is intended.

However, because the draftsman could have clarified the ambiguity is no reason to argue that “minimum compensation” must mean \$50,000.00. The same argument which RKO is using in its brief can be used against it. To paraphrase RKO’s own language, “it would have been a very simple thing, if the parties had \$50,000.00

in mind, in paragraph 29 to have said '\$50,000.00.' " Not only is this a good argument, but it is submitted that it is a better argument than that urged by RKO. We ask the Court to place itself in the position of the draftsman of the contract. RKO desires a paragraph 29 which would provide for the payment of \$50,000.00 if Miss Sheridan's services were not used in connection with the photoplay. Is it likely that the court, acting as a draftsman, would use any such phrase as "minimum compensation" to refer to \$50,000.00? Would not the Court have specifically provided that RKO "shall be deemed to have fully performed all of its obligations to artist by paying artist \$50,000.00"? The very fact that the phrase "minimum compensation" was used conclusively demonstrates that something must have been intended other than \$50,000.00 because it is inconceivable that somebody who intended to pay \$50,000.00 would not say so but instead would say that he is paying minimum compensation.

It should be noted that there is a reason for using the phrase "minimum compensation" in lieu of the phrase "flat compensation." "Flat compensation" is merely defined in the contract as the sum of \$150,000.00. [Ex. 1, O.B. par. 6.] Under a number of circumstances the minimum compensation which would be payable to Sheridan in the event that the motion picture was abandoned would differ from the flat compensation. Thus, if Sheridan was employed in the picture for 20 weeks instead of 15 weeks and the picture was abandoned, Sheridan would not be entitled to flat compensation, *i. e.*, to \$150,000.00. In such event she should be entitled to the flat compensation plus \$50,000.00 for the additional 5 weeks' work. Similarly, if Sheridan was ill and the contract was terminated because of such illness, RKO would not be obligated to pay Sheridan the flat compensation specified.

Under such circumstances RKO would only be obligated to pay Sheridan the “minimum compensation” specified in Paragraph 22. The language in Paragraph 29 would be wrong if it said that RKO shall be deemed to have fully performed all of its obligations to Sheridan by paying Sheridan the flat compensation. It is submitted that the intention of the parties was to pay the flat compensation as the same might have been adjusted either upward⁸ or downward⁹ in accordance with the contract.

A. The Offer of Proof Was Proper.

In this portion of its brief RKO purports to abstract the material contained in the offer of proof. It does so erroneously.

The offer of proof was intended to and encompassed an offer of evidence as to all of the negotiations from the inception of the project up to and including the execution and delivery of the documents out of which this litigation arose. [R. 106-110.]

The cases cited in Sheridan’s opening brief (O.B. 31) are not even mentioned, much less discussed.

RKO proceeds to make an argument about a point not raised in the opening brief, having to do with custom and usage. (R.B. 34.)

In the opening brief California Civil Code, Section 1645, was cited by Sheridan as authority for permitting evidence to show the meaning of technical words as understood by persons in the profession or business to which

⁸Sheridan did not work more than 15 weeks, and, therefore, is not entitled to any overages on that account.

⁹Sheridan was not ill or lawfully suspended so that RKO would not be entitled to a reduction.

they relate. The technical words with reference to which the offer of proof was made were "minimum compensation." The two cases cited in RKO's reply brief (R.B. 34) have nothing whatever to do with the point raised by Sheridan.

The appeal of Sheridan should, it is respectfully submitted, prevail and the judgment, in so far as it awards Sheridan the sum of \$50,000.00, with interest, should be affirmed and the cause should be remanded for further proceedings in the trial court on the issue of the liability of RKO to Sheridan in excess of the amount already awarded and in conformity with this Court's opinion and the decision it renders herein. Should this Court determine that the phrase "minimum compensation," without parol evidence, means and is equivalent to "flat compensation" or \$150,000.00, an appropriate judgment might be entered without further proceedings in the trial court.

Respectfully submitted,

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No. 12927.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ANN SHERIDAN,

Plaintiff, Appellee and Cross-Appellant,

vs.

RKO RADIO PICTURES, INC., a Delaware corporation,

Defendant, Appellant and Cross-Appellee.

**REPLY BRIEF OF APPELLANT RKO RADIO
PICTURES, INC.**

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No. 12927.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ANN SHERIDAN,

Plaintiff, Appellee and Cross-Appellant,

vs.

RKO RADIO PICTURES, INC., a Delaware corporation,

Defendant, Appellant and Cross-Appellee.

**REPLY BRIEF OF APPELLANT RKO RADIO
PICTURES, INC.**

I.

The Court Erred in Instructing the Jury That Sheridan Was Obligated to Render Services Under the Employment Contract.

The questions which are presented on this appeal arise from two provisions of the contract of employment. Paragraph 1 provides that Sheridan shall not be required to render any services pursuant to the contract unless and until she has approved each and all of three separate items, namely, the final shooting script, the director who will direct, and the actor who will portray the leading male role.

Paragraph 29 specifies, first, that RKO shall not be required to use Sheridan's services under the contract or

complete the production of the picture, and shall be deemed to have fully performed all of its obligations to Sheridan by paying her the minimum compensation payable under the contract; and second, if because Sheridan does not approve any one of the items specified in paragraph 1 she does not become obligated to and does not render any services pursuant to the contract, RKO shall not be required to pay her any compensation. The instructions of the court are challenged by RKO upon the ground that the court incorrectly told the jury that Sheridan was required, after the execution of the letter of April 29, 1949, to render services pursuant to the contract.

The brief of Sheridan on this appeal makes very clear the issue between the parties. Sheridan contends that, when concurrently with the execution of the contract of employment, she addressed a letter to RKO saying:

“This will confirm that I have approved and hereby approve Robert Young to portray the leading male role in CARRIAGE ENTRANCE. You shall not be obligated to assign him to portray the leading male role in the picture, but any other individual proposed by you to portray the leading male role in the picture shall be subject to my approval as set forth in Article 1 of said employment agreement.”,

she thereby became obligated to render her services to RKO. RKO, on the contrary, asserts that because of the failure of Sheridan to approve any actor proposed by RKO after Young refused the role, she never be-

came obligated to render her services in the picture. The court adopted the contention of Sheridan and instructed the jury accordingly.

The reference to Article 1 of the agreement makes consideration of that Article necessary. Therein it is provided that Sheridan *shall not* be required to render any services pursuant to the contract—*i. e.*, become bound to render her services to the defendant (the language of the court's instruction H-1) *unless and until* she approved an actor who would—past part. “will”, v.t. (Webster)—portray the leading male role. Inserting in the letter the language of the contract, Sheridan says to RKO that she approves Young; that RKO need not assign him to the role, but if RKO does not, Sheridan will not be required to render any services unless and until she approves some actor proposed by RKO who will portray the role. The letter bound Sheridan to render services only in the event that Young would portray the role. It expressly recognized that Young might refuse the assignment and excused RKO from obtaining his consent. If, as in fact happened, RKO endeavored to assign Young to the role and Young refused to play the part, the parties were in exactly the same position they were before Sheridan approved Young—and this because of the insistence of Sheridan that if Young would not play the role, she could not be required to render her services unless and until she approved the actor who would. Since—as the contract expressly says—Sheridan was not required to render her services pursuant to the contract unless and

until a certain event occurred—namely, her approval of the actor who would portray the leading male role—and since, as the evidence without conflict shows, that event never occurred—that is, Sheridan never approved an actor who would portray the leading male role—we find ourselves completely at a loss to understand how, as the court instructed the jury, Sheridan by her approval of Young who refused to portray the role, “thereby became bound to render her services” to RKO.

Sheridan says (Rep. Br. p. 5) that the parties stipulated that Sheridan approved Young, but the Record [R. p. 43] shows that the stipulation sets out in full the letter of April 29, 1949, and reliance on this stipulation affords persuasive evidence of recognition by Sheridan of the fallacy of her position. From the contract of employment it is clear that Sheridan insisted that she could not be required to render her services unless and until she approved the actor “who will portray the leading male role in CARRIAGE ENTRANCE.” She emphasized this position when in the letter of April 29, 1949, she agreed that RKO was not obligated to assign Young to the role and inserted the provision that “any other individual proposed by you to portray the leading male role in the picture shall be subject to my approval as provided in Article 1 of said employment agreement.” In other words, Sheridan did not intend to and could not be required to render her services pursuant to the contract until she had approved such actor. Nothing could more clearly affirm this intention of the parties than the long con-

tinued proposals of RKO, the counter-proposals of Sheridan, and the refusal of Sheridan to approve any actor proposed by RKO.

Both parties understood that Young might refuse the role. Both agreed, that in such event, RKO should propose another actor who must be approved by Sheridan before she could be required to proceed under the contract. Manifestly Young's refusal placed the parties in the identical position they occupied before the letter of April 29 was written, and manifestly both parties expressly contemplated this contingency. This letter is, therefore, of no moment in determining the rights of the parties here, and the situation presented is no different from that which obtained when the employment contract was executed. Certainly no one could contend, that prior to the letter of April 29, Sheridan could be required to render her services unless and until she approved a male lead for the picture.

The argument of Sheridan produces this result. The picture could not be produced without an actor to portray the leading male role. Such actor could be selected only with the approval of Sheridan. Sheridan repeatedly refused approval of actors proposed by RKO. Nevertheless Sheridan insists that she was obligated under the contract to render her services. The result is that Sheridan is contending that she was required to render services in a picture which could not be produced—an argument which we think requires no answer. Sheridan observes repeatedly in her brief, pages 2, 12 and 29, that

the argument of RKO is fallacious in that it rests upon the proposition that an "approval" is not an "approval." In fact the position of RKO is that the approval of Sheridan was conditioned upon the assignment of Young and his acceptance of the role. Only upon such assignment and acceptance could it be said that Sheridan approved an actor who would portray the part.

Sheridan, twice in her brief (p. 5 and p. 18), points to the fact that the provision with relation to a director is the same as that relating to the leading actor, and argues that since RKO makes no claim that Sheridan failed to approve a director, it follows that RKO is in error with respect to the approval of an actor. In fact, however, RKO did assign Robert Stevenson—one of the directors approved by Sheridan—to direct the picture, and Stevenson accepted the assignment. On the other hand, the condition which Sheridan attached to the selection of a male star,—namely if the person approved by her was not assigned to play the leading male role any other individual proposed must first be approved by her before she could be required to render her services—never was fulfilled. Had each of the three persons approved by the letter of April 29 refused to direct the picture, there would, of course, have been no difference in the situation with respect to the director than actually existed in regard to the actor.

II.

Sheridan Rendered No Service Pursuant to the Contract.

The second sentence of paragraph 29 reads as follows:

“However, if because artist does not approve any one or more of the items specified in paragraph 1, artist does not become obligated to and does not render any services pursuant hereto, producer shall not be required to pay any compensation whatever to artist hereunder.”

Sheridan insists this provision means that, irrespective of whether she became obligated to render services, RKO could not rely on this provision since she in fact rendered services in discussions concerning the leading male actor, in viewing films for the purpose of arriving at an agreement as to the leading male actor, and in appearing at the studio for costume fittings. We have nothing to add to the argument made in our opening brief that these were not compensable services under the contract. But it should be observed that the interpretation which Sheridan places on this sentence is one which would be available to her only in the event that the disjunctive “or” was used rather than the conjunctive “and”. Since it is the conjunctive which is used, the sentence can only mean what RKO contends it to mean—that is:

(1) If Sheridan fails to give the required approval she does not become obligated to render services; (2) if she does not become obligated to render services and does not render services pursuant to obligation; (3) RKO is not required to pay any compensation whatsoever. That

is to say, not until Sheridan (1) renders services, (2) under the provision of a contract by which she is bound (3) by reason of having given the required approval, can she recover compensation. Each one of the three factors or elements listed are indispensable prerequisites to Sheridan's case. To interpret the second sentence of Article 29 to mean that whether Sheridan gave the required approval she would be entitled to compensation if she rendered any services, is to abandon the conjunctive "and" and to substitute the disjunctive "or" or some other disjunctive phrase. In other words, had the parties contemplated that Sheridan would be entitled to compensation, whether or not the contract became binding on her, that intent would logically have been expressed in a disjunctive form, as was done in the first sentence of the Article.

The second sentence expressly precludes RKO's liability where, as here, Artist could render no services under obligation, since having failed to comply with the specified pre-requisites to obligation she never became bound. The services referred to in the second sentence, by the very terminology used, must be services rendered under obligation. "However, if . . . artist does not become obligated to and does not render any services pursuant hereto . . ." can only mean pursuant to the contract. And where the artist does not become obligated to render services under the contract, obviously services cannot be rendered pursuant to it. Had the intention of the writing been to allow compensation for services, regardless of the obligation to perform such services under the contract,

the words “pursuant hereto” would not have been used since they express a meaning precisely opposed to compensating the artist in any event, contract obligation or not.

That the term “services” imports only services in the actual filming of the motion picture, seems clear. This interpretation finds substantiation in paragraph 12 of the contract providing for activities of Sheridan preparatory to filming her portrayal of her assigned role. The said paragraph concludes “Artist shall not be entitled to any compensation for services rendered pursuant to this paragraph in addition to that specified in paragraph 6.” Since by their very nature the activities required of Sheridan by paragraph 12 would be meaningless unless her activities/services were also utilized in the picture, the above quoted terminology—precluding compensation therefor—would appear to indicate that performing said activities would not constitute services within the meaning ascribed that term by this contract.

By separate enumeration in a separate paragraph, by specifically providing against *any* compensation therefor, the contract impliedly and expressly has distinguished these activities from the Artist’s services constituting its subject matter. The meaning of this distinction can only be that though said activities are actually entered into and performed, their performance is not performance of the contract or within the meaning of the contract, *i. e.*, the activities/services listed in paragraph 12 are not the services the contract requires Sheridan to render and for which the contract provides compensation shall be paid.

III.

**The Court Excluded From Consideration by the Jury
the Vital Question of the Good Faith of the Parties
and Justification for Termination of the
Contract.**

Sheridan asserts (Br. p. 14) that RKO has no ground to complain that the court failed to fairly and adequately instruct the jury on the issue of good faith.

RKO did not and does not complain that the instructions (Court's Instructions K and T) were not adequate or correct on the question of what constitutes good faith. Our complaint is rather that these instructions were rendered negatory because by the prior Instructions (Court's Instructions A, B, G, and H-1—and particularly the latter) the jury was told that Sheridan was obligated to render her services pursuant to the contract, and the only question for the jury was: "Did Ann Sheridan render any services to the defendant RKO pursuant to the contract and prior to its termination on August 17, 1949?" As we indicated in our brief, the real issue between the parties was the good faith of the parties, in the proposals by RKO and rejections by Sheridan, of actors for the leading role and whether, after such refusals of Sheridan to approve any actor proposed, RKO was justified in terminating the contract on the ground that it had proposed competent and qualified actors, and the refusal of Sheridan to approve any thereof indicated it would have been an idle act to actually assign one of such individuals to the role.

The question (set forth in the preceding paragraph) posed in the Court's Instruction H-1 is followed by Instruction J-1 in which the jury is advised that if the answer is in the affirmative the jury need consider no

further issues in the case. These instructions, taken with the refusal to instruct as requested by RKO (defendant's requested Instruction No. 7) that any services Sheridan might have performed could not have been pursuant to the contract because she never approved an actor for the leading male role and never became obligated to render services pursuant to the contract, eliminated any possibility that the jury arrived at its verdict on any ground other than that the appearances of Sheridan at the studio for discussions of the male lead, for the viewing of pictures to determine the suitability of actors proposed by RKO, and for costume fittings and makeup, entitled her to a verdict. Consequently the remaining instructions might as well not have been given. In all subsequent instructions dealing with the subject of good faith, the court charged the jury, with respect to the effect of the presence or absence of good faith, that these matters were of no moment "if the jury found that Sheridan is entitled to your verdict under my previous instructions [Court's Instruction P—R. p. 595] and unless she is entitled to recover under my previous instructions. When I talk about 'my previous instructions' I am talking about the instructions concerning Section 29 of the contract" [Court's Instruction G—R. pp. 595-596]. The court went so far in this regard that it actually told the jury [Court's Instruction P—R. p. 595] that even though Sheridan *was motivated by and acted in bad faith* in her dealings with RKO on the matter of filling the male lead, she could still recover under the Court's Instructions H-1 and J-1. Thus, in effect, the court told the jury that if, during the period that the dealings with RKO on the matter of filling the male lead were going on—and during which period Sheridan rendered the serv-

ices she now relies on to sustain the verdict—Sheridan had no intention of approving an actor proposed by RKO for the male lead, no matter how competent or qualified, she could still recover for services rendered without any expectation or intent to agree on a leading man. The statement of the proposition would seem to furnish the only answer necessary.

The court instructed the jury that after Young refused to play the leading male role, it became necessary for Sheridan and RKO to agree on a new lead before the production could continue [Court's Instruction L—R. pp. 593-594]. This contingency was plainly within the contemplation of the parties. RKO contends—and Sheridan apparently agrees—that the contract contains an implied agreement that in endeavoring to reach such agreement each party should proceed in good faith. The court recognizes that the picture could not proceed without an agreement and a leading man and that such individual could be selected only by agreement of the parties. Yet in its Instruction P the court tells the jury that if it finds that Sheridan rendered services pursuant to the contract, she can recover despite the fact that she was motivated by and acted in bad faith in the negotiations for the selection of a leading man. This, too, in the face of the fact that all, or practically all, of the services for which Sheridan claims compensation were rendered during the very period during which these negotiations were being carried on. The confusing, inconsistent and prejudicial character of such an instruction must be immediately apparent.

The same observation may be made with respect to Court's Instruction G [R. pp. 595-596]. There the court

charges the jury that even though both parties proceeded in good faith to try to reach agreement on the leading man and were unable to do so, Sheridan could still recover if she rendered any services. But it could hardly be denied that the contract discharged each party from obligation to perform if their good faith efforts resulted in no agreement on a leading man. Any services of Sheridan were rendered during the period these good faith efforts were being made, and to permit recovery therefor would be to deny all legal effect to the fact that each party proceeded in good faith and were honestly unable to agree.

The errors in the charge of the court to the jury, we again earnestly and sincerely submit, prevented a fair trial and proper consideration by the jury of the real issues in the case as outlined in our opening brief herein, and the case should be remanded in order that such issues may be determined by a properly instructed jury.

Respectfully submitted,

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By GUY KNUPP,

*Attorneys for Defendant, Appellant and
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No. 12,927.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RKO RADIO PICTURES, INC., a corporation,

Appellant,

vs.

ANN SHERIDAN,

Appellee,

and

ANN SHERIDAN,

Appellant,

vs.

RKO RADIO PICTURES, INC., a corporation,

Appellee.

PETITION FOR REHEARING.

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No. 12,927.

IN THE

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FOR THE NINTH CIRCUIT

RKO RADIO PICTURES, INC., a corporation,

Appellant,

vs.

ANN SHERIDAN,

Appellee,

and

ANN SHERIDAN,

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vs.

RKO RADIO PICTURES, INC., a corporation,

Appellee.

PETITION FOR REHEARING.

RKO Radio Pictures, Inc., hereby respectfully petitions for a rehearing of both of the above entitled appeals.

I.

This court observes in its opinion "if RKO rightfully terminated under some other section of the contract, it was not liable at all." *But* the court fails to consider RKO's contention (*e. g.*, Op. Br., RKO Appeal, pp. 27, 42-3) that it did terminate the contract for breach—*i. e.*, Sheridan's failure to use good faith in considering suggested leading men; and the admitted fact that the trial court instructed the jury (in effect) that Sheridan was nevertheless entitled to recover "minimum" compensation if she had performed any services at all [Inst. P, R. 595.]

In other words, this court states that a certain factual situation would be a complete defense to RKO; but it does not even mention the fact that the trial court instructed the jury that it should give its verdict to Miss Sheridan irrespective of whether or not such fact existed.

This court's failure to consider this basic point is one basis for our petition for rehearing.

In addition, the court makes two vital statements of fact, upon which it places great reliance, which are not only not supported by, but are in direct conflict with, the record.

II.

In considering (on RKO's appeal) the meaning of the last sentence of Paragraph 29 of the contract (which is found to be ambiguous), this court invokes the well-established rule of construction to the effect that ambiguous language should be construed against the party who prepared that language.

The court (Opinion pp. 3-4) assumes that the language in question was prepared by RKO.

We will show that this assumption is without support in the record.

We will also show that on the basis of the statements of counsel in the briefs, and particularly on the basis of Miss Sheridan's offer of proof—which her counsel have invited this court to consider in determining the authorship of Paragraph 29—it *appears without dispute that the language in question was prepared by Miss Sheridan's counsel in its entirety.*

This misconception of the facts is a second basis for our petition for rehearing.

III.

RKO (and the trial court) thought that the term “minimum compensation” in Paragraph 29 unambiguously meant \$50,000 under the circumstances here presented.

Miss Sheridan, on the other hand, thought it meant \$150,000.

This court observes that “wherever the \$50,000 figure appears in the contract, it is designated not as ‘minimum compensation’ but as ‘flat compensation.’” The reason for the difference in terms is difficult to discover, if it was intended that “minimum compensation was \$50,000”; and accordingly holds the contract ambiguous.

The argument is compelling. We agree that if the draftsman meant the same amount that had already been defined as “flat compensation,” he would hardly have changed his terminology and referred to “minimum compensation.” Indeed, we so argued in our brief (Cross-Appellee’s Reply Br. p. 29).

The error in the court’s argument is that it has erroneously read the record.

The contract, Exhibit 1, clearly and expressly provides:

“ . . . said One Hundred Fifty Thousand Dollars (\$150,000.00) being hereinafter called the flat compensation . . . ” (App. Op. Br., Appendix p. 3; Cross-App. Op. Br., Appendix p. 3.)

Again, the logic of the court is unimpeachable; but it is applied to a mistaken view of the facts.

When applied to the true facts, the argument adopted by the court is strongly persuasive (if not, indeed, conclusive) of the correctness of the decision of the trial court on this phase of the case.

This factual error of the court is another basis for our petition for rehearing.

Brief Restatement of Facts.

Sheridan and RKO entered into a written contract under which she was employed as leading actress for a certain motion picture at a "flat compensation" of \$150,000 *plus* a percentage of the profits. Fifty thousand dollars was payable on account of the "flat compensation" on the first payday after photography commenced. The remaining \$100,000 of the flat compensation was deferred and payable *only* from receipts of the picture.

Sheridan was not required to render any services under the contract unless and until she should approve "the actor who will portray the leading male role" in the picture.

Concurrently with the execution of the employment agreement she signed a writing approving Mr. Robert Young as such actor; but expressly reciting that RKO was not required to assign him to the picture.

Mr. Young in fact rejected the role.

Discussions followed between RKO and Miss Sheridan with respect to a substitute actor. During this period Miss Sheridan also reported at the studio for consultations as to hair styling and costumes, as well as costume fittings. All of such activity took place after Mr. Young had rejected the role.¹

¹The meetings are listed by Miss Sheridan in her "Brief of Appellee Ann Sheridan," pages 6-7. In her testimony, she dated one of the meetings as July 5th to 7th [R. 91]—which would be several days before Young's rejection. However, at that meeting she was told that Mr. Young had rejected the role; so that it is apparent that she made a slight error in the date [R. 93].

RKO suggested several actors—including Mel Ferrer, Robert Ryan, Richard Basehart, and Van Heflin—but Miss Sheridan refused them all [R. 123-4].

It was and is a contention of RKO that there was an implied covenant on the part of Miss Sheridan to exercise her right of disapproval in good faith [and the Trial Court agreed; Inst. K, R. 593]; and that she did not do so. [The Trial Court found sufficient evidence on the subject to require it to submit the question of Miss Sheridan's bad faith to the jury in Inst. P, R. 595; but the jury did not pass on the question, since it was told by Inst. J-1, R. 592, that it need not do so if she had rendered any services pursuant to the contract.]

No agreement on a leading man having been reached, RKO terminated the employment agreement on August 17, 1949.

The jury awarded Miss Sheridan a verdict of \$50,000.

RKO appealed, contending that it was not liable at all.

Miss Sheridan appealed, claiming that she was entitled to more than \$50,000.

RKO's appeal involves a construction of the last sentence of Paragraph 29 of the contract:

"However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder."

Miss Sheridan's appeal involves a construction of the first sentence of Paragraph 29 of the contract, under which (it has been held by the trial court and by this

court) the liability of RKO is limited to the payment of "minimum compensation payable to the Artist hereunder."

The trial court upheld RKO's contention that "minimum compensation," in the circumstances here presented, meant \$50,000; Miss Sheridan contends that it meant \$150,000; and this court found the provision ambiguous, requiring the taking of additional evidence.

RKO's Contentions.

RKO's appeal presented two points:

1. RKO was excused from any payment because of Miss Sheridan's breach of her obligation to use good faith in the approval or disapproval of a leading man;

2. RKO was excused from any payment by the provisions of the last sentence of Paragraph 29.

It asks a rehearing on both points:

1. This court *failed to consider* RKO's first point, although the language of the court indicates that the point is well taken.

2. This court erroneously construed the last sentence of Paragraph 29, being led to its erroneous construction by a *misapprehension of the facts*.

RKO's contention on Miss Sheridan's appeal was that the term "minimum compensation" unambiguously meant \$50,000.

On its petition for rehearing, it contends:

3. This court erroneously rejected RKO's construction, being led to its erroneous conclusion by a *misapprehension of the facts*.

ARGUMENT.

I.

RKO Was Not Liable for Any Payment if Miss Sheridan Did Not Act in Good Faith in Disapproving Suggested Leading Men; and Was Entitled to (but Was Refused) a Jury Ruling on That Question.

This court has failed to rule on this contention.

Under the court's Instruction H-1 [R. 592], once Miss Sheridan appeared at the studio for costume fittings she became entitled to \$50,000.

She could then sit back, arbitrarily refuse to approve any actor submitted, and collect her "minimum compensation." RKO could do nothing to get the picture it had bargained for.

This is, we think, a highly shocking result; it is, we contend, precisely what happened; and the question is not explicitly discussed in this court's opinion.

We urged in our Opening Brief (pp. 42-3) that the court erred in instructing the jury that it could award minimum compensation despite Miss Sheridan's failure to act in good faith on submitted names; and in failing to instruct that if she did not act in good faith, RKO was not liable.

The law and the facts both seem clear.

It seems to be conceded that there were implied covenants of good faith: RKO must submit prospective leading men in good faith; Miss Sheridan must exhibit like good faith in refusing them. The court so instructed the jury, without objection [Inst. K, R. 593].

It seems elementary that if Miss Sheridan were guilty of a breach of contract which prevented RKO from getting the picture for which it contracted, she should recover nothing.

This seems to be the view of this court when it observes (Opinion p. 5) "Thus, if RKO rightfully terminated under some other section of the contract, it was not liable at all."

Whether Miss Sheridan did in fact act in bad faith was of course a point of dispute below. That the trial court thought there was enough evidence of bad faith to submit to the jury is demonstrated by its giving of Instruction P [R. 595].

In that instruction, the jury was told that if it found that Miss Sheridan acted in bad faith, she could not recover *unless she was entitled to minimum compensation under Instruction H-1*.

However, under Instructions J-1 and H-1 [R. 592], the jury was instructed not to consider the question of good faith if Miss Sheridan rendered any services pursuant to the contract.

We submit that these qualifications were erroneous—that if Miss Sheridan acted in bad faith in refusing to approve a leading man she could not recover \$50,000 for attending on costume fittings in anticipation of the selection of a leading man.

We submit that we were entitled to a finding of the jury on this issue; and that we are entitled to a rehearing to have this court pass on this fundamental issue.

II.

Services Are Not Rendered “Pursuant to” the Contract if the Contract Imposed No Obligation to Render Them.

This court’s construction to the contrary is based upon a misconception of the facts.

We do not here renew our argument (on which this court thought it unnecessary to pass) that Miss Sheridan never became “obligated to render any services pursuant to the contract.”

It is entirely clear that after Mr. Young declined the role, with no one assigned with Miss Sheridan’s approval to perform that part, she was not *then* obligated to perform any services.

And it was only after Mr. Young’s refusal of this part that she claims to have rendered any services.

Were those services rendered “pursuant to” the contract?

Certainly not in the ordinary acceptance of those words.

Webster says “Pursuant: Acting or done in consequence of or in prosecution (of any thing).”

The services rendered by Miss Sheridan were clearly not “in consequence of” the contract—they were voluntarily rendered in anticipation of later agreement.

This court, however, refuses to construe the words as meaning “services under the contract under obligation”² (Opinion p. 3).

²The court observes that the jury found that services “under the contract” were rendered. But they did so under an instruction [H-1, R. 592] that Miss Sheridan had become bound under the contract.

In thus refusing to accept the plain meaning of the words, the court relies on the rule of law that any ambiguity must be resolved against the party creating it.

The rule is, of course, sound.

But it is in fact applied against the wrong party.

A. THE LANGUAGE IN QUESTION WAS PREPARED BY
MISS SHERIDAN'S COUNSEL.

The court will recall that Polan Banks Production, Inc., originally intended to produce the picture, and negotiated an employment contract with Miss Sheridan to that end. Thereafter, the original plans were changed, and RKO took over from Polan Banks what has been called the "package" (Sheridan Op. Br. p. 4), including the agreement to employ Miss Sheridan on the terms that had been negotiated.

When Miss Sheridan's counsel, on her appeal (Sheridan Op. Br. pp. 10, 15 *et passim*) asserted that the contract was prepared by RKO, we protested that the record did not so show (RKO Reply Br. pp. 3-4); and asked leave to state the facts in that connection.

Miss Sheridan's counsel apparently do not question the accuracy of our statement (Cross-Appellant's Reply Br. p. 3, footnote 2); but they assert that the facts are available in the record through Miss Sheridan's offer of proof.

We gladly accept their concession that we may look to the offer of proof for the determination of the question of the authorship of Paragraph 29.

It appears that Mr. Loyd Wright, acting as attorney for Miss Sheridan, prepared the first draft contract between Miss Sheridan and Polan Banks.

When RKO took over the "package," it also took over the employment agreement that had been negotiated.

However, certain changes in form were necessary, since RKO would now be both Producer and Distributor; and there would accordingly be no Distribution contract which would be referred to to measure the profits under which Miss Sheridan was to participate.

The legal department of RKO accordingly took the Banks agreement, and made pencilled notations of the essential changes.

The draft so marked was offered in evidence by Miss Sheridan and is Exhibit 5 for identification.

It will be observed that Paragraph 29 was included in the draft agreement submitted to RKO in the identical form in which it appears in the final employment agreement except that RKO inserted the words "or to complete the production of 'Carriage Entrance'" in the first sentence of the paragraph.

In other words, any ambiguity that exists was in the language of the agreement which RKO took over from Polan Banks, and which was prepared by Miss Sheridan's attorney.

III.

The Words "Minimum Compensation" Unambiguously Mean \$50,000 Under the Facts Here Appearing.

The term "minimum compensation" does not, on its face, appear difficult of construction.

"Minimum" says Webster, "The least possible amount assignable, admissible, possible, etc., in a given case."

In this case, the least compensation payable to Miss Sheridan was clearly \$50,000.

The minimum could not possibly be more than \$50,000—for it is entirely clear that if the picture were made and released and never recovered its cost of manufacture, \$50,000 would be all she could get.

The court suggests that under some circumstances she might get less than \$50,000.

Of course, if she were guilty of a breach of contract, she would get nothing—but that is clearly not the situation we are considering.

Equally, if she failed to render her required services by reason of death or disability before she had served for five weeks, she might get less than \$50,000—but Miss Sheridan herself supplies the conclusive answer to that contention (Cross-Appellant's Reply Br. p. 18, note 9): "Sheridan was not ill nor lawfully suspended, so that RKO would not be entitled to a reduction."

We do not, in other words, here argue what would be the proper construction of the contract to pay "minimum compensation" if Miss Sheridan had so become ill: although we suggest that the specific illness clause would make unnecessary any reference to Paragraph 29.

But \$50,000 is the smallest amount Miss Sheridan could recover if—as here—she performed all services she was lawfully called upon to perform.

The court, however, suggests that:

“Wherever the \$50,000 figure appears in the contract, it is designated not as ‘minimum compensation,’ but as ‘flat compensation.’ The reason for the difference in terms is difficult to discover, if it was intended that ‘minimum compensation’ was \$50,000.”

We are inclined to agree that such change of language—if it in fact existed—would create an ambiguity.

But the fact is that \$50,000 is *never* referred to as “flat compensation.”

“Flat compensation,” wherever that term is used in the contract, means [by express definition: Ex. 1, Par. 6: Op. Br. p. 3] \$150,000.

We submit that the argument of the court demonstrates the correctness of the ruling of the trial court on this point.

It has never been contended by anyone that “minimum compensation” means anything other than either (a) \$50,000 or (b) \$150,000.³

But, as we argued in our Cross-Appellee’s Reply Brief, page 29, the fact that the draftsman changed his language from “*flat* compensation” to “*minimum* compensation” is all but conclusive evidence that \$150,000 was not intended.

When that argument is coupled with the fact that \$150,000 is obviously not a “*minimum*,” we submit that the trial court was correct in its holding.

³Perhaps adjusted by reason of illness or other facts not here appearing: Cross-Appellant’s Reply Brief, p. 18.

IV.

None of the Proffered Parol Evidence Was Admissible.

We urged that all of the offered parol evidence was admissible.

This court observes that “certain portions of the evidence offered were very relevant in determining the meaning of the phrase.”

Such a ruling, of course, offers no guidance to us or the court if a retrial is had.

We sincerely assert that a careful reexamination of the offer of proof discloses nothing which, in our opinion, is admissible.

The offer is to show, first that the original deal was negotiated between Miss Sheridan and Polan Banks [R. 106]—a fact that was stipulated.

Second, that Miss Sheridan’s attorney wrote a letter—setting up the skeleton of the employment [R. 106]. However, the letter (a) does not mention this point; and (b) does not appear to have been brought to RKO’s attention.

Third, “that it was the intention of plaintiff and Mr. Banks . . . that plaintiff was to receive minimum compensation of \$150,000”—an intention which does not appear to have been disclosed to RKO.

Fourth, that neither plaintiff nor Polan Banks meant \$50,000 by the term “minimum compensation”—again, not communicated to RKO.

Fifth, "*That there was no discussion between plaintiff and defendant with reference to the meaning of the phrase 'minimum compensation' when plaintiff and defendant executed and delivered the contract of April 29, 1949*" [R. 108].

Sixth, that the budget included \$150,000 for Miss Sheridan's compensation.

Seventh, that RKO and its officers understood that plaintiff was to receive compensation of \$150,000—which, of course, must mean in accordance with the contract.

Eighth: Draft of the Polan Banks employment contract with Miss Sheridan; with no change with respect to this portion of Paragraph 29, nor with respect to the provision of a "*flat compensation*" of \$150,000 with \$50,000 payable in cash and \$100,000 deferred.

Ninth: Draft of Polan Banks' employment contract with Miss Sheridan, with RKO's pencilled changes—including no changes in the portion here under consideration.

Tenth: Custom and usage in the motion picture industry [R. 110].

We submit that secret intention of other parties, not disclosed to RKO, are not admissible against it—particularly since it is admitted that in the offer that the subject was not discussed between Miss Sheridan and RKO.

And the authorities in our Cross-Appellee's Reply Brief, page 34, conclusively show that custom and usage are not admissible unless pleaded.

Conclusion.

The opinion of this court fails to consider one of RKO's basic defenses—Miss Sheridan's breach of her obligation of good faith—nor the failure of the trial court to submit it to the jury.

Moreover, the court, in construing the contract, on each of the separate appeals falls into a clear error of fact, and indeed on Miss Sheridan's appeal has misread the words of the contract it is attempting to construe.

We submit that a rehearing should be granted; that the trial court's construction of the words "minimum compensation" should be upheld; but that the judgment should be reversed with instructions to submit RKO's defenses, referred to in its appeal, to the jury under proper instructions.

Respectfully submitted,

MITCHELL, SILBERBERG & KNUPP,

By GUY KNUPP,

Attorneys for Petitioner.

Certificate of Counsel.

I, Guy Knupp, do hereby certify that I am one of the counsel for the petitioner RKO Radio Pictures, Inc., and that the foregoing petition for rehearing is in my judgment well founded and is not interposed for delay.

GUY KNUPP.

No. 12941

United States
Court of Appeals
for the Ninth Circuit.

FEDERAL POWER COMMISSION,
Appellant,
vs.
ARIZONA EDISON COMPANY, INC.,
Appellee.

Transcript of Record

Appeal from the United States District Court,
District of Arizona.

FILED
APR - 2 1951
WALL & LLOYD WALKER
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Arizona

Civil Action No. 1528 Phoenix

FEDERAL POWER COMMISSION,
Plaintiff,

vs

ARIZONA EDISON COMPANY, INC.,
Defendant.

COMPLAINT

1. It appears to the Plaintiff, the Federal Power Commission (hereinafter sometimes referred to as the Commission), that Defendant, Arizona Edison Company, Inc., is engaged and about to engage in acts or practices which constitute and will constitute violations of a Commission order duly issued, under the provisions of the Federal Power Act and particularly Sections 203, 301 and 309 thereof (16 U.S.C. §§ 824b, 825 and 825h), on March 31, 1950, In the Matter of Arizona Edison Company, Inc., Docket No. E-6194. The Commission brings this action to enjoin such acts and practices and for an order by this Court commanding the Defendant Arizona Edison Company, Inc., to comply with the requirements of that Commission order. A copy of the Commission order, and Opinion No. 190 which is a part thereof, is attached hereto as Exhibit A, p. 9, *infra*.

2. This action arises under Sections 314(a), 314(b) and 317 of the Federal Power Act (16 U.S.C. §§ 825m(a), 825m(b), 825p).

3. Plaintiff Federal Power Commission was created and established as provided in Section 1 of the Federal Power Act (16 U.S.C. § 729) and is vested with duties and powers as provided in that Act, *inter alia*.

4. Defendant is an Arizona corporation, doing business in the State and District of Arizona, having its principal office in the City of Phoenix, in that District, and is an inhabitant of that District. Defendant also is engaged in and about to engage in some or all of the acts or practices complained of herein in that District.

5. The Commission order of March 31, 1950, referred to in paragraph 1, above, was entered in a proceeding initiated by Commission order issued under the provisions of the Federal Power Act, particularly Sections 203, 301, and 309 thereof (16 U.S.C. §§ 824b, 825 and 825h), on February 16, 1949, directing Defendant to show cause, in writing under oath, why it should not be held to be a "public utility" as that term is defined in the Federal Power Act (16 U.S.C. §§ 791a, *et seq.*); why it should not be required to comply with the provisions of that Act and the rules and regulations promulgated thereunder applicable to such public utilities; and why it should not be required, accountingwise, to dispose, by charge to earned surplus, of the excess over depreciated book cost of the purchase price paid by Defendant in a certain acquisition of electric utility properties from California Electric Power Company. A copy of that order is attached hereto as Exhibit B, p. 32, *infra*.

6. Prior to initiation of the proceeding referred to in paragraph 5, above, California Electric Power Company had applied for Commission authorization for that sale of electric utility properties to Defendant, and the Commission had issued an order on February 24, 1948, setting a hearing on that application and requiring Defendant to show cause why the Commission should not find that upon consummation of the purchase Defendant would become and be a public utility within the meaning of the Federal Power Act and subject to regulations as such thereunder. A copy of that order is attached hereto as Exhibit C, p. 34, *infra*. To secure Commission authorization of the sale without the delay incident to such hearing and determination of jurisdiction over Defendant, Defendant filed a written statement dated March 10, 1948, regarding postponement of such determination. A copy of that statement is attached hereto as Exhibit D, p. 36, *infra*. By that statement Defendant agreed if as a result of a subsequent separate and lawful proceeding it should be established that Defendant is subject to the jurisdiction of the Commission, approval of the sale would be without prejudice to the Commission to require such accounting for the purchase as the Commission might have lawfully required at the time of the approval of such sale. Defendant therein further undertook upon consummation of such purchase and for a period of two years thereafter to restrict an amount of \$500,000 of its earned surplus against any declaration of dividends.

7. Upon consideration of that statement, *inter alia*, the Commission vacated its order of February 24, 1948, and authorized the sale, by order issued March 11, 1948. A copy of that order is attached hereto as Exhibit E, p. 37, *infra*. California Electric Power Company, in compliance with the Commission's Rules and Regulations and paragraph (D) of the order of March 11, 1948 (Exhibit E, p. 39, *infra*), duly reported that the sale and purchase were consummated on April 1, 1948. A copy of that report is attached hereto as Exhibit F, p. 40, *infra*. The Commission's order of March 31, 1950 (Exhibit A, p. 25, *infra*), in which it found that it has jurisdiction over the Defendant as a public utility and required certain accounting in relation to the purchase, was issued within the two-year period following the purchase on April 1, 1948, for which Defendant had agreed (Exhibit D, p. 36, *infra*), to restrict a part of its earned surplus.

8. After authorizing the sale by California Electric Power Company to Defendant the Commission caused members of its staff to make a field investigation of the Defendant's facilities and operations for the purpose of determining the facts relevant to the jurisdiction of the Commission over Defendant as a "public utility" within the meaning of the Act. By and with the Commission's show cause order of February 16, 1949 (Exhibit B, p. 33, *infra*), referred to in paragraph 5, above, a copy of the report of that investigation was served on Defendant. Service was made on Defendant and re-

ceipt thereof was acknowledged as set forth in paragraph 16, hereof.

9. By letter dated March 28, 1949, Defendant's general counsel stated that in his opinion the Commission did not have jurisdiction over Defendant; that he had so advised Defendant; and that, acting upon this advice, Defendant would not make any response to the Commission's order of February 16, 1949, or enter any appearance in the proceeding initiated by that order. A copy of that letter is attached hereto as Exhibit G, p. 41, *infra*.

10. On April 21, 1949, the Commission issued an order setting a public hearing to commence June 6, 1949, in the proceeding initiated by the order of February 16, 1949 (referred to in paragraph 5, above). By order issued June 1, 1949, the hour and place of the hearing were fixed and the proceeding was consolidated with another proceeding entitled *In the Matter of Central Arizona Light and Power Company*, Docket No. E-6212. The orders of April 21 and June 1, copies of which are attached as Exhibits H, and I, respectively (pp. 42, 43, *infra*), were served on Defendant and receipt thereof was acknowledged, as set forth in paragraph 16, hereof.

11. Public hearing was held pursuant to the orders referred to in paragraph 10, above, before a Presiding Trial Examiner. At the hearing the Commission's staff introduced oral testimony and exhibits. Defendants did not appear or participate in the hearing.

12. On September 22, 1949, the Presiding Trial

Examiner issued his intermediate decision, in accordance with the Commission's rules, wherein he found Defendant to be a "public utility" within the meaning of that term as used in the Federal Power Act and directed Defendant to comply with the provisions of that Act, and the rules and regulations promulgated thereunder (including the Uniform System of Accounts), applicable to "public utilities"; to file certain specific accounting data; and accountingwise to dispose of the excess of acquisition cost over original cost arising in the acquisition of electric utility properties from California Electric Power Company. The Presiding Trial Examiner's decision was served on Defendant and receipt thereof was acknowledged as set forth in paragraph 16, hereof.

13. Counsel for the Commission's staff on October 12, 1949, filed exceptions to the Presiding Trial Examiner's decision on two points. A copy of the exceptions were served on Defendant and receipt thereof was duly acknowledged as set forth in paragraph 16, hereof. On March 31, 1950, the Commission, in accordance with its rules, duly issued a final decision in the proceeding, consisting of Opinion No. 190 and order of that date, referred to in paragraph 1, above (Exhibit A, p. 9, *infra*). That decision was served on Defendant and receipt thereof acknowledged as set forth in paragraph 16, hereof.

14. The Commission in its decision, referred to in paragraph 13, above, on the basis of the evidence in the record, found and determined that Defendant owns and operates facilities for the transmission of

electric energy in interstate commerce, which facilities are in addition to and do not include facilities used for the generation of electric energy or facilities used in local distribution or only for the transmission of electric energy in intrastate commerce or facilities for the transmission of electric energy consumed wholly by the transmitter; and that Defendant by reason of such ownership and operation is a "public utility" within the meaning of that term as used in the Federal Power Act. It further found that Defendant is subject to the requirements of that Act and the rules, regulations and orders issued thereunder applicable to "public utilities" and made findings with respect to the accounting treatment of the acquisition from California Electric Power Company. The Commission accordingly ordered Defendant to:

(i) Comply with the provisions of the Federal Power Act applicable to "public utilities" and the rules and regulations promulgated thereunder, including the requirements of the Uniform System of Accounts;

(ii) File with Commission, within 90 days from the date of the order, the data, statements, information, cost studies and reports required by and under the provisions of Electric Plant Accounts Instruction 2-D of the Commission's Uniform System of Accounts Prescribed for Public Utilities and Licensees and the Commission's order of May 11, 1937, related thereto;

(iii) Classify the excess over depreciated book cost (amounting to not less than \$487,872.52)

paid by Defendant to California Electric Power Company for the latter's Arizona properties, in Account 100.5, Electric Plant Acquisition Adjustments, and then to dispose of that amount by a charge to Account 271, Earned Surplus;

(iv) Submit, within 30 days from the date of the order, two certified copies of the journal entries giving effect to the disposition referred to in (iii), above.

15. Defendant did not apply to the Commission for rehearing of that order of March 31, 1950 (Exhibit A, p. 9, *infra*), under Section 313(a) of the Federal Power Act (16 U.S.C. § 8251(a)) within 30 days from the date of such issuance or at any time thereafter, and did not at any time thereafter apply for court review thereof under Section 313(b) of the Act (16 U.S.C. § 8251(b)).

16. Due service by the Commission, in accordance with Sections 1.17(a) and 1.30(i) of the Commission's General Rules and Regulations (18 C.F.R. 1.17(a) and 1.30(i)), of orders and documents hereinabove referred to and acknowledgment of receipt thereof by Defendant was made by the mailing thereof by registered mail and return of Registry Return Receipts, copies of which are attached as Exhibits, and due service by counsel for the Commission staff, in accordance with Section 1.17(b) of the Commission's Rules (18 C.F.R. § 1.17(b)), is shown by certificates of service, copies of which are attached as Exhibits, as follows:

Description	Order or Document	Para. Herein	Date	Ex. No.	Trans. Ltr. or Cert.		Acknow'ment	
					Reg. No.	Ex. No.	Date	Ex. No.
Order initiating jurisdictional proceeding.....		5	2-16-49	B	443257	N	2-21-49	O
Order Setting Hearing.....		10	4-21-49	H	443611	P	4-26-49	Q
Order Setting Hour and Place, and Consolidating.....		10	6- 1-49	I	443464	R	6- 6-49	S
Trial Examiner's Decision.....		12	9-22-49	-	443879	T	9-27-49	U
Exceptions to same.....		13	10-12-49	-	—	V	—	-
Opinion 190 and Order.....		1, 13	3-31-50	A	443924	W	4- 5-50	X

17. Defendant failed and refused, and continues to fail and refuse, to comply with the requirements of the Commission's order of March 31, 1950, referred to in paragraph 14 hereof; and has done so and continues to do so despite repeated demands upon it for compliance, set forth in letters from the Commission to Defendant, which letters (together with registry receipt thereof where sent by registered mail) are attached as Exhibits J, K, L, and M (pp. 44-48, *infra*).

18. By the failures and refusals referred to in paragraph 17, above, Defendant is engaged and is about to engage in acts or practices which constitute or will constitute violations of the Commission's order of March 31, 1950 (Exhibit A, p. 9, *infra*).

19. Defendant will, unless enjoined, continue to engage in the acts and practices referred to in paragraph 18, above.

Wherefore, the Commission prays:

I. That an order be made commanding Defendant to comply with the applicable provisions of the Federal Power Act and the rules and regulations promulgated thereunder, including the requirements of the Uniform System of Accounts Prescribed for Public Utilities and Licensees, as ordered by paragraph (A) of the Commission's order of March 31, 1950 (Exhibit A, p. 30, *infra*).

II. That an order be made commanding the Defendant forthwith to file the data, statements, infor-

mation, cost studies and reports required by and under the provisions of Electric Plant Accounts Instruction 2-D of the Commission's Uniform System of Accounts Prescribed for Public Utilities and Licensees and order of May 11, 1937, applicable thereto, as ordered by paragraph (B) of the Commission's order of March 31, 1950 (Exhibit A, p. 30, *infra*) but within such reasonable period of time from the date of issuance of its order as the Court shall fix.

III. That an order be made commanding the Defendant to classify forthwith the excess over depreciated cost, amounting to not less than \$487,-872.52, paid by it to California Electric Power Company for the latter's Arizona properties, in Account 100.5, Electric Plant Acquisition Adjustments, and forthwith to dispose of that amount from that account by a charge to Account 271, Earned Surplus, as ordered by paragraph (C) of the Commission's order of March 31, 1950 (Exhibit A, p. 31, *infra*).

IV. That an order be made commanding the Defendant to file with the Commission two certified copies of the journal entries giving effect to the disposition referred to in III, above, as ordered by paragraph (D) of the Commission's order of March 31, 1950 (Exhibit A, p. 31, *infra*), but within such reasonable period of time from the date of issuance of its order as the Court shall fix.

V. That the Defendant be enjoined from continuing the practice of failing and refusing to comply with the Commission's order of March 31, 1950,

In the Matter of Arizona Edison Company, Inc.,
Docket No. E-6194 (Exhibit A, p. 9-31, *infra*).

VI. Such other, further and different relief as
to the Court may seem just.

/s/ BRADFORD ROSS,
General Counsel.

/s/ HOWARD E.
WAHRENBROCK,
Assistant General Counsel.

/s/ REUBEN GOLDBERG,
Attorney.

/s/ ABRAHAM R. SPALTER,
Attorney.
Counsel for Plaintiff.

EXHIBIT A

United States of America
Federal Power Commission

Docket No. E-6194

In the Matters of
ARIZONA EDISON COMPANY, INC.

Docket No. E-6212

CENTRAL ARIZONA LIGHT AND POWER
COMPANY

OPINION No. 190

By the Commission:

These are proceedings by the Commission, upon
its own motion, requiring respondents to show cause

why they should not be found to be "public utilities" under the Federal Power Act,¹ pursuant to orders dated February 15, 1949, in Docket No. E-6194 and April 20, 1949, in Docket No. E-6212. By order of June 1, 1949, the Commission consolidated the two proceedings for hearing purposes, and after due notice a public hearing was held on June 6, 1949. Opportunity to be heard was there afforded all interested persons, but neither Arizona Edison Company, Inc. ("Arizona Edison") nor Central Arizona Light and Power Company ("Central Arizona") appeared or participated in the proceedings.

Background of Proceedings

Arizona Edison.

On October 23, 1947, in Docket No. IT-6096, California Electric Power Company filed an application under Section 203 of the Federal Power Act for authority to sell to Arizona Edison substantially all of its properties and electric facilities in Yuma County, Arizona, at a purchase price of \$850,000 as compared with a depreciated cost on the books of California Electric amounting to \$362,127.48 as of July 31, 1947. Arizona Edison is an Arizona corporation with its principal office in Phoenix, Arizona. It is engaged, solely in the State of Arizona, in the business of transmitting electric energy, and distributing and selling it at retail.² By order of

¹49 Stat. 863, 16 U.S.C. 791a, et seq.

²It makes wholesale sales also, but from a system not involved here.

February 20, 1948, the Commission directed that Arizona Edison show cause at a hearing to be held on March 11, 1948, why it should not find that, upon consummation of the proposed purchase, Arizona Edison would become a "public utility" subject to accounting requirements to be prescribed by the Commission with respect to the purchase price paid.

By letter of March 10, 1948, Arizona Edison advised the Commission that it would consummate the purchase upon entry by the Commission of an order authorizing the transaction even though the order stated that it was entered without prejudice to the right of the Commission to have its jurisdiction over Arizona Edison determined in a "lawful, separate and subsequent proceeding" and, if jurisdiction should be established, without prejudice to the Commission to require such accounting for the purchase as it might have required at the time of approval. In addition, Arizona Edison advised that it would restrict an amount of \$500,000 of its earned surplus against any declaration of dividends for a period of two years after the transaction.

By order of March 11, 1948, the Commission approved the proposed sale and vacated its order of February 20, 1948, directing that a hearing be held. The sale was consummated on April 1, 1948, and during July and August, 1948, a field study of Arizona Edison's facilities and operations was made by members of the Commission's staff. On the basis of the report on this study, the Commission by order of February 15, 1949, directed Arizona Edison to show cause why it should not be found to be a "pub-

lie utility” and directed to dispose of the amount of \$487,872.52, representing excess over depreciated book cost paid by Arizona Edison to California Electric, by a charge of such amount to earned surplus. A copy of the staff report was served on Arizona Edison with this order.

By letter of March 28, 1949, Arizona Edison’s General Counsel stated that, in his opinion, the Commission was without jurisdiction, that he had advised the company not to make any response to the order or to enter any appearance in the proceeding, and that the officials of the company had concluded to follow his advice.

Central Arizona.

Central Arizona is likewise an Arizona corporation with its principal office in Phoenix, Arizona. It is engaged, solely in the State of Arizona, in the business of generating and transmitting electric energy, and distributing and selling it at retail and wholesale. By letter of October 19, 1945, the Commission advised Central Arizona that it had been classified for administrative purposes as a “public utility” and was required to submit reclassification

And original cost studies in accordance with this Commission’s Uniform System of Accounts. By letter of September 16, 1946, Central Arizona denied the Commission’s jurisdiction and stated that it was unwilling to comply with the Commission’s Uniform System of Accounts.

By order of April 20, 1949, the Commission directed Central Arizona to show cause why it should not be found to be a “public utility” and that a

public hearing be held on June 6, 1949. By letter of May 7, 1949, General Counsel for Central Arizona, who was also General Counsel for Arizona Edison, advised the Commission that Central Arizona had accepted his advice that the Commission lacked jurisdiction and that it should not make any response to the order, or enter any appearance in the proceeding, or appear at the hearing.

Consolidated hearing.

Although the two companies are not shown to be affiliated, the matters involved and the issues presented were generally interrelated and in many respects identical. Hence, the cases were consolidated by order of June 1, 1949, for purpose of hearing, which was held on June 6, 1949, in Washington, D. C. The staff of the Commission introduced evidence establishing all facts regarding the companies' facilities and operations in so far as they are pertinent to this proceeding. Neither company appeared or participated.

Facilities and Operations

Upon consideration of the evidence introduced at the hearing, which was uncontroverted by Arizona Edison or Central Arizona since neither appeared or participated in the proceeding, we find the following to be the pertinent facts and circumstances relating to the facilities and operations of such companies.

Arizona Edison.

Arizona Edison owns and operates eight separate electric systems scattered through central and southern Arizona, among which are the Maricopa, Coolidge-Florence, and Yuma Systems. These three systems, the only ones involved in this proceeding, supply ultimate consumers alone in their separate service areas, and all receive electric energy generated by the United States Bureau of Reclamation ("Bureau") in California at the Parker Dam and in Nevada at the Hoover Dam. The Yuma System also receives energy generated by the Bureau at its Siphon Drop Generating Station in California.

At the federally owned and operated Hoover Dam on the Colorado River, defining the boundary between Arizona and Nevada, energy produced by generators on the Nevada side of the River³ is supplied to a 230 kv transmission line of the Metropolitan Water District of Southern California. This line extends in a southerly direction through parts of Nevada and California to the generating station in California of the Bureau's Parker Dam on the Colorado River, defining the boundary between California and Arizona. This line is the only connection between the two projects and is used, among other things, to transmit energy from Hoover to Parker, except at those times when energy from

³It is possible that energy generated on the Arizona side of the river may be mingled with that from the Nevada side in case of an outage, on infrequent occasions, of one or more of the Nevada generators.

the Parker Dam is being supplied to the Metropolitan Water District in California.

From Parker the Bureau transmits energy generated there in California—often mingled with energy generated at Hoover in Nevada—over its two 161 kv lines a distance of 137 miles to the Bureau's substation at Phoenix, Arizona. At Phoenix, a part of this energy is delivered to Central Arizona and to the Salt River Valley Water Users Association; the remainder of this energy is transmitted in a southeasterly direction over a 115 kv line owned by the Bureau to Coolidge, Arizona, 53 miles from Phoenix, where part is delivered to the United States Indian Irrigation Service ("Indian Service"), and to Tucson, Arizona, where part is delivered to The Tucson Gas, Electric Light and Power Company.⁴

Part of the energy that the Indian Service receives from the Bureau at Coolidge it transmits 23 miles in a southwesterly direction over its 69 kv line and delivers at its Casa Grande substation to Arizona Edison's Maricopa System, which is located about 40 miles south of Phoenix. Arizona Edison transmits such energy, amounting to 5,486,746 kwh in 1948, 9.6 miles west to its Sexton substation over its 69 kv line without serving any customers between Casa Grande and the Sexton substations. At this substation the energy is stepped down and converted for service to an irrigation pumping load in

⁴Deliveries to the Indian Service and to the Tucson company thus made directly by the Bureau, are made in part for the account of Central Arizona.

the area. Although the Indian Service maintains a diesel generating station at Coolidge, at all times when the energy the Indian Service receives at Coolidge from the Bureau exceeds the load on the Indian Service's 69 kv circuits, including the delivery to Arizona Edison's Maricopa System at Casa Grande, the energy delivered at Casa Grande is 100% out-of-state. This condition obtained during substantial periods of time. At other times, the out-of-state energy is mingled with energy generated at Coolidge.

At Coolidge, the Indian Service delivers some of the out-of-state energy received from the Bureau, as stated above, mingled with energy generated at its Diesel plant in Coolidge, totalling 5,617,972 kwh in 1948, at 12 kv to Arizona Edison's Coolidge-Florence System. Part of this energy is transmitted by Arizona Edison from Coolidge in a northeasterly direction to Florence over its 11.5 mile, 12 kv line, which connects substations in the two towns, and serves no customers along the route.

The Bureau delivers out-of-state energy (37,449,-145 kwh in 1948) to Arizona Edison's Yuma System, located in the extreme southwestern corner of Arizona, at Arizona Edison's Mesa substation and at the Bureau's Headquarters substation in Yuma, and so furnishes almost the entire requirements of this system.⁵ This energy is transmitted at 34.5 kv from

⁵A relatively small amount of 250,937 kwh was also furnished in 1948 by standby facilities of Arizona Edison in Yuma and 232,719 kwh were purchased from Central Arizona and California Electric Power Company for emergency purposes.

the Bureau's Gila substation about ten miles east of Yuma and from the Bureau's Siphon Drop generating station to the north in California. Energy reaches the Gila substation on the Bureau's 116-mile, 161 kv line from Parker Dam.

The Yuma System includes several 34.5 kv lines and their attendant substations.

The longest of these lines commences at the Mesa Substation in Yuma, passes the municipal limits, and extends in a southwesterly direction through agricultural areas about 12 line miles to a substation in the incorporated city of Somerton (pop. 1,247 in 1940) and thence about 7 line miles further to a substation in the unincorporated community of Gadsden (pop. 350 in 1940), 19 miles in all without serving customers. At these substations, and at two others which are served by the line between Yuma and Somerton, the energy is stepped down 34.5 kv to 4 kv, and lines at the lower voltage, some of which are supported on the same poles as the 34.5 kv lines for various distances, emanate from each of the substations to serve the adjacent localities including the towns of Somerton and Gadsden. The Mesa-Gadsden line, therefore, serves the function of transmitting energy in bulk from the Mesa substation in Yuma to the several substations referred to above where local distribution begins for service to the respective communities and agricultural areas.

Another 34.5 kv line extends eastward from the Mesa substation about 13 miles, serving a substation

at an airport and one customer about three miles from its terminus, and also supports on the same poles a 4 kv secondary line for about three miles. Other 34.5 kv lines are .5, 1.25, and 1.5 miles in length. These lines, the Mesa-Gadsden line, and the airport line are used to transmit out-of-state energy and serve no customers directly except the airport and one other customer on the airport line mentioned above.

Central Arizona.

Central Arizona owns and operates an integrated system in central and southwestern Arizona located in Maricopa, Yuma and Yavapai Counties, and a separate system serving the town of Parker. From the former system it sells energy to 62,000 ultimate consumers in 54 communities in a service area of 12,000 square miles and to several customers for resale. In 1948, its total energy requirements were 624,804,505 kwh, and its total wholesale sales amounted to 55,327,432 kwh. It purchased 270,686,705 kwh of which 211,192,002 kwh was supplied by the Bureau and generated at Hoover Dam in Nevada and Parker Dam in California.

The Bureau transmits out-of-state energy from Parker and Hoover, over its two 161 kv circuits extending from Parker to Phoenix where delivery is made to Central Arizona.⁶ The Bureau steps this energy down to 69 kv and 12.5 kv in its substation and delivers it to Central Arizona's busses of the same voltage in the same substation.

The 12.5 kv bus in the Phoenix substation, which

⁶See, *supra*, p. 6.

is used to serve the Phoenix area, is connected with Central Arizona's one generating station, a steam plant of 72,500 kw capacity. The generation of this station was insufficient in 1947 to supply the Phoenix area; and, although its generation in 1948 exceeded the Phoenix area requirements, Central Arizona's total system retail requirements exceeded such generation by more than 100,000,000 kwh.

Throughout 1947 and 1948, at least 50%, and at times 100%, of the energy on the 69 kv bus in the Phoenix substation was out-of-state energy. Energy from this bus is supplied in these proportions to three 69 kv circuits of Central Arizona known as the Avondale, Sycamore, and Litchfield lines.

The Avondale and Litchfield lines form a 69 kv loop approximately 39 miles long extending northwest from Phoenix to Central Arizona's Litchfield substation. From Litchfield, a 69 kv line extends southwesterly 21.5 miles to Central Arizona's Buckeye substation. Another 69 kv line extends 69 miles southwesterly from Litchfield through the Buckeye substation to Central Arizona's Dendora substation. From Litchfield, still another 69 kv line extends northwesterly about 42 miles to its Wickenburg substation, where Central Arizona sells energy at wholesale to the town of Wickenburg, amounting to 1,955,800 kwh in 1948, and thence on 27 miles to its Aguila substation.

The Sycamore line leaves the 69 kv bus in the Phoenix substation and extends northerly about 77 miles to an interconnection with Arizona Power Company, where Central Arizona sells energy to

that company for resale, amounting to 11,959,567 kwh in 1948.

The aforementioned 69 kv lines serve no customers directly, except the wholesale customers mentioned, and are used to transmit varying amounts of out-of-state energy in bulk from the Phoenix substation to the points of interconnection with such wholesale customers and to the various substations for retail distribution in the surrounding areas.

Including those mentioned above, Central Arizona made the following sales for resale in 1948:⁷

KWH	Purchaser	Place
1,955,800	Town of Wickenburg	Wickenburg
11,959,567	Arizona Power Company.....	Sycamore
2,092,635	Arizona Edison Company, Inc.	Gila Bend
7,204,885	U. S. Indian Irrigation Service.....	Coolidge
30,885,076	Salt River Valley Water Users Association	(Mostly at) Phoenix
1,125,690	Tucson Gas, Electric Light and Power Company	Tucson
103,779	Miscellaneous.	
<hr/>		
55,327,432		

⁷Arizona Edison sold its Gila Bend System to Central Arizona at the end of 1948 so that Central Arizona's sales to Arizona Edison at Gila Bend ceased at that time.

Deliveries on the sales to the Indian Service and to the Tucson Company, were made over electric facilities of the Bureau. See p. 6 and note 4. Deliveries at Phoenix on the sales to the Salt River Valley Water Users Association were made over Bureau facilities in the substation in Phoenix.

The figure for deliveries to Arizona Edison was taken from Central Arizona's Power System Statement for 1948, Form No. 12, as compared with a figure of 2,132,311 kwh appearing in Arizona Edi-

Discussion

Whether Arizona Edison and Central Arizona are “public utilities” depends on whether they own and operate the kinds of facilities referred to in Section 201(b) of the Act, that is, facilities for the “transmission of electric energy in interstate commerce” or for “the sale of electric energy at wholesale in interstate commerce.” That Section also excludes from Commission jurisdiction “facilities used for the generation of electric energy,” “facilities used in local distribution,” facilities used “only for the transmission of electric energy in intrastate commerce,” and “facilities for the transmission of electric energy consumed wholly by the transmitter.” It is clear to us that each of these companies owns and operates facilities for such transmission or sale, or both, which do not fall within any of these exceptions.

Section 201(c) provides that “electric energy shall be held to be transmitted in interstate commerce if transmitted from a state and consumed at any point outside thereof.” Here, all of the out-of-state energy involved—from Hoover, from Parker and from Siphon Drop—is transmitted in interstate commerce within that definition and Section 201(b) of the Act. *Federal Power Commission v.*

son’s Form No. 12 and in its Annual Report, FPC Form No. 1, and in the testimony. The figure for deliveries to the Indian Service was taken from Central Arizona’s Form No. 12 and compares with the figure of 7,308,664 kwh appearing in Central Arizona’s FPC Form No. 1 and in the testimony.

East Ohio Gas Company, et al., 338 U. S. 464, No. 71, October Term, 1949, decided January 9, 1950; Jersey Central Power & Light Company v. Federal Power Commission, 319 U. S. 61, 70-73.

Such is Arizona Edison's transmission of out-of-state energy on its 69 kv line from Casa Grande to Sexton, and from Coolidge to Florence on its 12 kv line. After such transmission in bulk, the voltage is stepped down and distribution made. So used, these lines are for the transmission of electric energy in interstate commerce within the meaning of Section 201(b) and do not come within its exceptions. Also, practically all of the energy required by Arizona Edison's Yuma system is transmitted from Hoover, Parker, and Siphon Drop. On the Yuma system, Arizona Edison's 34.5 kv lines transmit that out-of-state energy in bulk to the various substations where it is stepped down for subsequent distribution. These lines are also facilities for the transmission of electric energy in interstate commerce under Section 201(b), and outside all its exceptions.

Likewise, the energy which Central Arizona receives at Phoenix from Parker and Hoover and transmits in bulk over its 69 kv lines to its various substations and to the interconnections with its wholesale customers is energy transmitted in interstate commerce within the meaning of Section 201(c). This use of these lines by Central Arizona makes it subject to the jurisdiction of the Commission under Section 201(b), and such use does not fall within any of the exceptions provided by that section.

Additionally, some of these lines are used in making sales for resale of the out-of-state energy so transmitted. They are thus facilities used "for the sale of electric energy at wholesale in interstate commerce" within the meaning of Section 201(b). *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498.

We have not overlooked the fact that the out-of-state energy involved in both cases was generated outside of and transmitted into Arizona by an agency of the Federal Government. However, the fact that a Federal agency owns and operates the facilities by which this portion of the operations is accomplished is of no consequence in determining whether continued transmission and subsequent sale of that energy by means of facilities owned and operated by others constitute transmission and sale in interstate commerce by such other persons within the meaning of the Act.

It follows that, within the meaning of Section 201(b) of the Act, both Arizona Edison and Central Arizona own and operate facilities for the transmission of electric energy in interstate commerce, and Central Arizona also owns and operates facilities for the sale at wholesale of electric energy in interstate commerce. These facilities do not fall within any of the exceptions of that Section. Thus, both companies are "public utilities" under Section 201(e) and subject to the applicable requirements of the Act and the rules and regulations thereunder, including such requirements as we may properly impose with regard to accounting.

As related above, on April 1, 1948, Arizona Edison purchased from the California Electric Power Company certain electric properties in Yuma County, Arizona. California Electric's application for the approval of this sale, referred to in our order of March 11, 1948, in Docket No. IT-6096, recited that the purchase price of the properties to be paid by Arizona Edison was \$850,000 and that the depreciated book cost of such property, as of July 31, 1947, was \$362,127.48. Under such circumstances, the excess above original cost less depreciation paid by Arizona Edison for such property, and reflected on its books, is not less than \$487,872.52, since the original cost less depreciation which was \$362,127.48 on July 31, 1947, was further reduced by depreciation which accrued between July 31, 1947 and April 1, 1948. The excess above depreciated original cost is properly classifiable under the Commission's Uniform System of Accounts in Account 100.5, Electric Plant Acquisition Adjustments, pending final disposition thereof.

Arizona Edison's commitment to hold \$500,000 of earned surplus for a period of two years after the consummation of the sale as evidenced by its letter of March 10, 1948, was for the purpose of providing a reserve for the disposition of any acquisition adjustment which the Commission might require Arizona Edison to "write off" should it be found to be a "public utility" under the Act. It is proper and desirable in the public interest, therefore, to provide by order that the amount paid by Arizona Edison to California Electric in excess of the actual depre-

ciated book cost of the properties as of April 1, 1948, be written off to earned surplus. To give effect to this determination Arizona Edison shall submit, within 30 days after the issuance of this order, appropriate journal entries to adjust its books of account accordingly. Until this has been accomplished, the amount of \$500,000 reserved by Arizona Edison in its earned surplus account, as stated in its letter of March 10, 1948, shall be maintained without diminution on account of dividends or otherwise.

An appropriate final order with findings of fact will be entered in accordance with this opinion.

.....,

Nelson Lee Smith, Chairman.

.....,

Thomas C. Buchanan,
Commissioner.

.....,

Mon C. Wallgren,
Commissioner.

.....,

Harrington Wimberly,
Commissioner.

Dated at Washington, D. C., this 29th day of March, 1950.

.....,

Leon M. Fuquay, Secretary.

Date of Issuance: March 31, 1950.

United States of America
Federal Power Commission

In the Matters of:

Docket No. E-6212

ARIZONA EDISON COMPANY, INC.;

Docket No. E-6194

CENTRAL ARIZONA LIGHT AND POWER
COMPANY

Before: Commissioners Nelson Lee Smith, Chair-
man; Thomas C. Buchanan, Mon C. Wall-
gren and Harrington Wimberly.

March 29, 1950.

FINDINGS AND ORDER DETERMINING
STATUS AND PROVIDING FOR DISPO-
SITION OF PLANT ACQUISITION AD-
JUSTMENT

The Commission having considered the record with respect to the matters involved and the issues presented, and having issued its Opinion No. 190, which is hereby incorporated by reference and made a part hereof, further finds:

(1) Arizona Edison Company, Inc. ("Arizona Edison"), is an Arizona corporation with its principal office in Phoenix, Arizona. It owns and operates eight separate electric systems wholly within Arizona. Among such systems are the Maricopa, Coolidge-Florence, and Yuma systems, which serve ultimate consumers alone.

(2) Central Arizona Light and Power Company ("Central Arizona") is an Arizona corporation with its principal office in Phoenix. It owns and operates an integrated electric system in Arizona serving Phoenix and surrounding areas and a small separate system serving Parker, Arizona. From these systems, which are located wholly within the State, Central Arizona sells electric energy to ultimate consumers and for resale.

(3) Energy generated in Nevada, at the Hoover Dam, a federally owned project on the Colorado River, is transmitted, over a line owned and operated by the Metropolitan Water District of Southern California and extending through parts of Nevada and California to the Parker Dam, also a federally owned project on the same river.

(4) Energy generated in California at the Parker Dam, and energy from the Hoover Dam, is transmitted into Arizona by the United States Bureau of Reclamation ("Bureau") over its two 161 kv lines to its substation at Phoenix, Arizona. The Bureau delivers some of this energy to Central Arizona at this point and transmits some of it on its 115 kv line to Coolidge, Arizona, where the Bureau makes delivery to the United States Indian Irrigation Service ("Indian Service") in part for the account of Central Arizona, and to Tucson, Arizona, where the Bureau makes delivery to Tucson Gas, Electric Light and Power Company, also in part for the account of Central Arizona.

(5) The Indian Service delivers energy to Ari-

zona Edison's Maricopa system at Casa Grande. At times all of such energy comes from out-of-state, having been received by the Indian Service from the Bureau at Coolidge, as stated in (4) above, and transmitted by the Indian Service to Casa Grande. At other times such out-of-state energy is mingled with energy generated by the Indian Service at its Coolidge generating station.

(6) The Indian Service delivers energy to Arizona Edison's Coolidge-Florence system at Coolidge. Such energy is in part generated out-of-state and received from the Bureau as stated in (4) above and in part generated by the Indian Service at Coolidge.

(7) The Bureau transmits energy from Parker in California and from Hoover in Nevada over its 161 kv line to its Gila substation in Arizona, from which deliveries are made to Arizona Edison's Yuma system at its Mesa substation and at the Bureau's Headquarters substation, both in Yuma, Arizona.

(8) The Bureau transmits energy generated at its Siphon Drop Generating Station in California north of Yuma and delivers it to Arizona Edison's Yuma system at the points of delivery mentioned in (7) above.

(9) Arizona Edison owns and operates in its Maricopa system a 69 kv line extending westerly approximately 9.6 miles from the Casa Grande substation of the Indian Service to Arizona Edison's Sexton substation. This line is used to transmit

energy in bulk generated outside of the state, received from the Indian Service as stated in (5) above, and consumed on the Maricopa system.

(10) Arizona Edison owns and operates in its Coolidge-Florence system a 12 kv line, 11.5 miles long, extending from its Coolidge substation to its Florence substation. On this line, it transmits energy in bulk, in part generated outside of the state, received from the Indian Service as stated in (6) above, and consumed in Florence.

(11) Arizona Edison owns and operates in its Yuma system several 34.5 kv lines emanating from its Mesa substation in Yuma over which it transmits energy in bulk generated outside the state from the points where the energy is received from the Bureau as stated in (7) and (8) above to the points where the energy is stepped down to 4 kv and local distribution is made to consumers on the Yuma system. Such points include the incorporated city of Somerton and the unincorporated community of Gadsden located in an agricultural area 12 line miles and 19 line miles respectively from the Mesa substation in Yuma.

(12) Arizona Edison, as an established course of business, transmits electric energy in interstate commerce over the facilities referred to in findings (9), (10), and (11), and the facilities referred to in those findings are facilities for such transmission and not facilities used for the generation of electric energy or facilities used in local distribution or only for the transmission of electric energy in intra-

state commerce or facilities for the transmission of electric energy consumed wholly by the transmitter.

(13) Arizona Edison owns and operates facilities for the transmission of electric energy in interstate commerce which is transmitted from the state in which it is generated and consumed at points outside thereof, which facilities are in addition to and do not include facilities used for the generation of electric energy, or facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or facilities for the transmission of electric energy consumed wholly by the transmitter.

(14) Arizona Edison owns and operates facilities subject to the jurisdiction of the Commission under Part II of the Federal Power Act within the meaning of Section 201(e) of the Act and is therefore a "public utility" within the meaning of the Act, and subject to its applicable requirements and the rules, regulations and orders issued thereunder.

(15) Central Arizona sells and delivers energy for resale to the Town of Wickenburg at Wickenburg and to Arizona Power Company at Sycamore.

(16) Central Arizona also sells energy to the Indiana Service at Coolidge for resale and to the Tucson Gas, Electric Light and Power Company at Tucson for resale, but in both cases deliveries are made over electric facilities of the Bureau as stated in (4) above.

(17) Central Arizona sells electric energy to approximately 62,000 ultimate consumers in 54 communities having a total population of approximately 350,000.

(18) To serve the customers referred to in (15), (16), and (17) above, Central Arizona purchases substantial amounts of energy from the Bureau and owns and operates a steam-electric generating station of 72,500 kw capacity at Phoenix, and a 69 kv transmission system aggregating approximately 280 circuit miles, including: lines from Phoenix through Litchfield to Buckeye and Dendora, 130 miles; from Litchfield to Wickenburg and Aguila, 69 miles; from Phoenix to Sycamore, 77 miles.

(19) All of Central Arizona's purchased energy, which is delivered by the Bureau at Phoenix as stated in (4) above, and all of the energy generated at the Phoenix generating station which is not used to supply the local loads served by its 12 kv transmission system at Phoenix, is transmitted in bulk through its 69 kv bus and lines to serve all parts of its system. Throughout 1947 and 1948, more than 50%, and at some times as much as 100%, of the electric energy transmitted through such bus and lines was generated outside the state, and was transmitted by Central Arizona in such ratios over its 69 kv transmission lines for sale to and resale by Arizona Power Company and the Town of Wickenburg, as well as for sale at retail by Central Arizona to its own retail customers.

(20) The transmission lines referred to in (18), together with appurtenant equipment, are used as an established course of business, for the transmission of electric energy generated outside of Arizona and consumed within that state and are facilities for transmission of electric energy in interstate commerce within the meaning of Section 201(b) of the Federal Power Act.

(21) As an established course of business, Central Arizona sells electric energy to each of the customers referred to in (15) and (16) at wholesale in interstate commerce within the meaning of Section 201(b) of the Act.

(22) In addition to the transmission lines referred to in (18), Central Arizona owns and operates facilities for the sales for resale, referred to in (15) and (16) including substations, metering equipment, transformers, and billing equipment. Such facilities are facilities for the sale at wholesale of electric energy in interstate commerce within the meaning of Section 201(b) of the Act.

(23) The facilities for the transmission or sale of electric energy at wholesale in interstate commerce referred to in (20) and (22) are in addition to and do not include facilities used for the generation of electric energy or facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or facilities for the transmission of electric energy consumed wholly by the transmitter.

(24) Central Arizona is therefore a "public utility" within the meaning of the Act and subject to its applicable requirements, and the rules, regulations and orders issued thereunder, including the requirements of the Uniform System of Accounts prescribed by the Commission.

(25) The Commission approved the sale by California Electric Power Company of substantially all of its facilities in Yuma County, Arizona, to Arizona Edison, on March 11, 1948, in Docket No. IT-6096. These facilities consisted of approximately 33 miles of 34.5 kv single circuit transmission lines serving electric loads through six substations having an aggregate capacity of 4,900 kva, and connected with distribution facilities emanating from such substations. The purchase price paid by Arizona Edison for such facilities was \$850,000, while California Electric in its application in the above docket stated that the book cost of the facilities was \$623,831.87, and the depreciated book cost as of July 31, 1947, was \$362,127.48. At the time of the consummation of the sale on April 1, 1948, at least \$487,872.52 of the purchase price paid by Arizona Edison was in excess of the depreciated book cost reflected on the books of California Electric Power Company, and classifiable in Account 100.5, Electric Plant Acquisition Adjustments.

(26) Approval of the sale referred to in (25) was based upon the application of California Electric Power Company and the commitment of Arizona Edison stated in its letter of March 10, 1948,

in which Arizona Edison agreed that if, as a result of a subsequent separate and lawful proceeding, it should be established that Arizona Edison was subject to the jurisdiction of the Commission, the Commission's approval of the sale would be without prejudice to a requirement respecting the accounting for such purchase by Arizona Edison as the Commission might lawfully have required at the time of approval. To insure the accounting which might lawfully be required, Arizona Edison agreed to retain for such purpose \$500,000 in its earned surplus account for a period of two years from the date of the consummation of the sale.

(27) After a field study and examination of the facilities and operations of Arizona Edison, the Commission on February 15, 1949, directed that company to show cause why the Commission should not find and determine that it was a "public utility" within the meaning of that term as used in the Federal Power Act, and, in the event it should be found to be a public utility, why the Commission should not direct that Arizona Edison dispose of the amount of \$487,872.52, referred to in (25), representing excess over depreciated book cost paid to California Electric Power Company for the latter's Arizona properties, by a charge of such amount to earned surplus.

(28) Arizona Edison made no response to the show cause order of February 15, 1949, referred to in (27) above. Subsequently, the hearing in this proceeding was held after due notice to Arizona

Edison, but it did not appear or participate in the hearing.

(29) Arizona Edison has owned and operated the facilities referred to in (9) and (10) above, and a portion of the facilities referred to in (11) above, since prior to the acquisition of the facilities described in (25) above, and was a "public utility" within the meaning of that term as used in the Federal Power Act at the time of such acquisition and has been since that date.

(30) It is reasonable and appropriate to carry out the purposes of the Federal Power Act that Arizona Edison be directed and required (a) to dispose of the adjustment amount referred to in (25) by charging it to earned surplus, (b) to submit journal entries making such disposition effective, and (c) to retain the amount of \$500,000 referred to in (26) until such journal entries are recorded upon its books of account.

The Commission orders:

(A) Arizona Edison Company, Inc., and Central Arizona Light and Power Company be and they are hereby required to comply with the applicable provisions of the Federal Power Act and the rules and regulations promulgated thereunder, including the requirements of the Uniform System of Accounts.

(B) Arizona Edison Company, Inc., and Central Arizona Light and Power Company shall, within 90 days from the date of this order, file with the Commission the data, statements, information, cost

studies and reports required by and under the provisions of Electric Plant Accounts Instruction 2-D of the Commission's Uniform System of Accounts Prescribed for Public Utilities and Licensees and the Commission's order of May 11, 1937.

(C) The excess over depreciated book cost paid by Arizona Edison to California Electric Power Company for the latter's Arizona properties (amounting to not less than \$487,872.52) shall be classified in Account 100.5, Electric Plant Acquisition Adjustments, and then be disposed of by a charge of that amount to Account 271, Earned Surplus.

(D) Arizona Edison shall submit, within 30 days from the date of this order, two certified copies of the journal entries giving effect to the above-required disposition and shall continue to restrict against the payment of dividends or other disposition, the amount of \$500,000 referred to in finding (26) above until such journal entries are recorded upon its books of account.

By the Commission.

.....,

Leon M. Fuquay, Secretary.

Date of Issuance: March 31, 1950.

EXHIBIT B

United States of America Federal Power
Commission

Docket No. E-6194

In the Matter of:

ARIZONA EDISON COMPANY, INC.

Before: Commissioners Nelson Lee Smith, Chairman; Thomas C. Buchanan, Claude L. Draper, Leland Olds and Harrington Wimberly.

February 15, 1949.

ORDER TO SHOW CAUSE

On March 11, 1948, the Commission issued an order in the proceeding entitled In the Matter of California Electric Power Company, Docket No. IT-6096, authorizing and approving the sale by that company of substantially all of its electric facilities in Yuma County, Arizona, to Arizona Edison Company, Inc., ("Arizona Edison").

The Commission in the above-mentioned order, determined that the proposed sale of facilities, which included facilities for the transmission of electric energy subject to the jurisdiction of this Commission, would be in the public interest by reason of the terms and conditions contained in the application and the letter submitted by Arizona Edison on March 10, 1948.

Arizona Edison in its letter dated March 10, 1948, agreed that if as a result of a subsequent separate

and lawful proceeding it is established that Arizona Edison is subject to the jurisdiction of the Commission, approval of the sale would be without prejudice to the Commission to require such accounting for the purchase as the Commission might have lawfully required at the time of the approval of such sale. Arizona Edison also advised in its letter that it would restrict an amount of \$500,000 of its earned surplus account against any declaration of dividends for a period of two years from the date of consummation of the transaction. The sale was consummated on April 1, 1948.

Members of the Commission's staff have recently completed a field study and examination of the electric facilities and operations of Arizona Edison and have submitted a report to the Commission entitled "Field Study of the Facilities and Energy Flow on the Arizona Edison Company, Inc., and Connecting Systems," which report is herewith served on Arizona Edison.

From the staff's report, it appears that Arizona Edison owns and operates facilities in its Gila Bend, Maricopa, Coolidge-Florence, and Yuma Systems for the transmission of electric energy which is generated in the States of California and Nevada and consumed at points outside the State in which it is generated, including facilities which are in addition to, and do not include facilities for the generation of electric energy, facilities used in local distribution, or only for the transmission of electric energy in intrastate commerce, or facilities for the transmission of electric energy consumed wholly by the transmitter. Arizona Edison may, therefore, be

a public utility within the meaning of that term as used in the Federal Power Act.

The Commission orders:

(A) Arizona Edison shall show cause, if any there be, under oath:

(i) Why the Commission should not find and determine that it is a public utility within the meaning of that term as used in the Federal Power Act;

(ii) In the event that Arizona Edison is found to be a public utility within the meaning of that term as used in the Federal Power Act, why the Commission should not require it to comply with the provisions of the Federal Power Act, and the General Rules and Regulations promulgated thereunder, applicable to public utilities;

(iii) In the event that Arizona Edison is found to be a public utility within the meaning of that term as used in the Federal Power Act, why the Commission should not by order, find, determine and direct that Arizona Edison dispose of the amount of \$487,872.52, representing excess over depreciated book cost paid by Arizona Edison to California Electric Power Company for the latter's Arizona properties, by a charge of such amount to **earned surplus**.

(B) The Secretary shall serve a copy of the report referred to above upon Arizona Edison concurrently with the service of this order.

(C) Arizona Edison shall submit its response to this order and to the above-mentioned report in writing, within 45 days from the date of service of this order.

(D) Arizona Edison's response shall be in the form of an offer of proof; shall set forth with particularity the facts upon which it relies; shall state whether Arizona Edison admits or denies the accuracy of the facts as stated in the report; and shall state upon what facts, if any, or what conclusions, Arizona Edison desires opportunity to introduce evidence and to be heard. Denials of the allegations of this order and of the statements in the staff report which are general and unsupported by specific facts upon which Arizona Edison relies will not be considered as complying with this order.

By the Commission.

/s/ LEON M. FUQUAY,
Secretary.

Date of Issuance: February 16, 1949.

Docketed February 15, 1949.

EXHIBIT C

United States of America Federal Power
Commission

Docket No. IT-6096

In the Matter of:

CALIFORNIA ELECTRIC POWER COMPANY.

Before: Commissioners Nelson Lee Smith, Chair-
man; Claude L. Draper, Leland Olds and
Harrington Wimberly.

February 20, 1948

ORDER FIXING DATE OF HEARING ON
APPLICATION FOR AUTHORITY TO
SELL FACILITIES AND REQUIRING
PURCHASER TO SHOW CAUSE WITH
RESPECT THERETO

It appears to the Commission that:

(1) On October 23, 1947, an application was filed pursuant to Section 203 of the Federal Power Act by California Electric Power Company ("Applicant"), seeking an order authorizing it to sell substantially all of its properties and electric facilities in Yuma County, State of Arizona, to Arizona Edison Company, Inc., for a base purchase price of \$850,000 subject to certain adjustments.

(2) The application, the annual reports and power system statements of the companies involved, and a report of a field inspection by the Commission staff indicate that the facilities proposed to be sold include a part of Applicant's facilities having a

value in excess of \$50,000 which may be subject to the jurisdiction of the Commission, and that the proposed sale thereof may be subject to the requirements of Section 203 of the Federal Power Act.

(3) Upon consummation of the proposed sale by Applicant and purchase by Arizona Edison Company, Inc., ("Respondent"), if such sale is subject to the requirements of Section 203, the Respondent will be a public utility within the meaning of the Federal Power Act, and, as such, subject to accounting requirements imposed by the Commission from the time of consummation of such sale.

(4) Upon final consideration of the application the Commission may find the proposed sale consistent with the public interest only upon conditions with respect to the accounting for the purchase by the Respondent.

The Commission orders that:

(A) A hearing be held on March 11, 1948, at 10:00 a.m. in the Hearing Room of the Federal Power Commission, 1800 Pennsylvania Avenue, N. W., Washington, D. C., concerning the matters involved and the issues presented by such application and this order.

(B) The respondent show cause at the hearing why the Commission should not find and determine that upon consummation of the proposed purchase Respondent will become and be a public utility within the meaning of the Federal Power Act, subject to accounting requirements prescribed by the Commission, including any requirements with re-

spect to the purchaser's accounting for the purchase price paid which the Commission may find necessary in the public interest.

By the Commission.

LEON M. FUQUAY,
Secretary.

Date of Issuance: February 24, 1948.

Docketed February 26, 1948.

EXHIBIT D

Arizona Edison Company, Inc.
Phoenix, Arizona

March 10, 1948.

Federal Power Commission,
Washington, D. C.

Gentlemen:

With respect to the Matter of California Electric Power Company, Docket #IT-6096, the undersigned, Arizona Edison Company, Inc., as contract purchaser under contracts of October 7, 1947, between the companies named, of the properties of the California Company in Yuma County, Arizona, as set forth in the application of that Company for order authorizing sale pursuant to Section 203(a) of the Federal Power Act by this letter advises the Commission:

That Arizona Edison will consummate purchase of such properties upon entry by the

Commission of order authorizing the California Company to sell such properties, all as stipulated in said contracts of October 7, 1947, even though such order to California Company may declare that such order is entered without prejudice to the right of the Commission, if it so elects, to have adjudicated in a lawful, separate and subsequent proceeding the question of its jurisdiction under the Federal Power Act, if any, over Arizona Edison and if jurisdiction should be established, then without prejudice to the Commission to require such accounting for the purchase as lawfully it might have required at the time of approval of such sale.

Further, Arizona Edison advises that upon consummation of such purchase and for a period of two years from and after such consummation, Arizona Edison will restrict an amount of \$500,000 of its earned surplus (including but not in addition to restrictions contained in that certain "Indenture of Mortgage and Deed of Trust" by Arizona Edison to Bank of New York and William Young, Jr., Trustees, of date March 1, 1944) against any declaration of dividends during such period.

Yours truly,

ARIZONA EDISON
COMPANY, INC.

By /s/ FRANK L. SNELL,
General Counsel.

Docketed March 10, 1948.

EXHIBIT E

United States of America Federal Power
Commission

Docket No. IT-6096

In the Matter of:

CALIFORNIA ELECTRIC POWER COMPANY.

Before: Commissioners Nelson Lee Smith, Chair-
man; Claude L. Draper, Leland Olds, and
Harrington Wimberly.

March 11, 1948.

ORDER APPROVING SALE OF FACILITIES,
AND VACATING ORDER FIXING DATE
OF HEARING AND ORDER TO SHOW
CAUSE

It appears to the Commission that:

(a) On October 23, 1947, an application was filed pursuant to Section 203 of the Federal Power Act by California Electric Power Company ("Applicant"), seeking an order authorizing it to sell substantially all of its properties and electric facilities in Yuma County, Arizona, to Arizona Edison Company, Inc., for a base purchase price of \$850,000 subject to certain adjustments.

(b) The facilities proposed to be sold consist of approximately 33 miles of 34.5 kv single circuit transmission lines serving six substations having an aggregate capacity of 4900 kva, together with dis-

tribution facilities emanating from the aforementioned substations.

(c) The application indicates the book cost of the facilities proposed to be sold to be \$623,831.87 and the depreciated book cost at July 31, 1947, to be \$362,127.48.

(d) By order dated February 20, 1948, the Commission directed that a hearing be held on March 11, 1948, in Washington, D. C., concerning the issues presented by the application and further directed Arizona Edison Company, Inc., to show cause at the hearing why the Commission should not find and determine that upon consummation of the proposed purchase it would become and be a public utility within the meaning of the Federal Power Act subject to accounting requirements prescribed by the Commission, including any requirements with respect to the accounting for the purchase price paid which the Commission may find necessary in the public interest.

(e) On March 3, 1948, Applicant filed a Petition for Reconsideration of the Commission's order of February 20, 1948, referred to in paragraph (d) above.

(f) By letter dated March 10, 1948, Arizona Edison Company, Inc., advised the Commission that if as a result of a subsequent separate and lawful proceeding it is established that Arizona Edison Company, Inc., is subject to the jurisdiction of the Commission, approval of the sale at this time will be without prejudice to the Commission to require such accounting for the purchase as the Commis-

sion might have lawfully required at the time of the approval of such sale. Arizona Edison Company, Inc., further advised that it will restrict an amount of \$500,000 of its earned surplus account against any declaration of dividends, for a period of two years from the date of consummation of the transaction.

(g) Written notice of the aforesaid application has been duly given to the Public Utilities Commission of California, the Public Service Commission of Nevada, the Corporation Commission of Arizona and to the Governors of each of those States. Notice of the application was also published in the Federal Register on October 31, 1947 (12 F.R. 7095), stating that any person desiring to be heard or to make any protest with reference to the application should file a petition or protest on or before November 14, 1947. No protest or petition or request to be heard in opposition to the granting of such application has been received.

(h) The Corporation Commission of Arizona and the Public Utilities Commission of California, by orders dated October 31, and November 19, 1947, respectfully, have approved the proposed sale of facilities.

Upon consideration of the application, the exhibits attached thereto and incorporated therein by Applicant, the Petition for Reconsideration filed by Applicant, and the letter submitted by Arizona Edison Company, Inc., in this matter, the Commission finds that:

(1) Applicant, a corporation, is a public utility within the meaning of Section 203 of the Federal Power Act subject to the jurisdiction of the Commission as heretofore described and set out in the Commission's order dated June 11, 1946, In the Matter of California Electric Power Company, Docket No. IT-5991. Applicant subsequent to the sale of its Arizona properties, as hereinafter authorized, will continue to be a public utility within the meaning of that term as used in the Federal Power Act.

(2) The proposed sale of facilities by Applicant include facilities for the transmission of electric energy transmitted from one State and consumed by persons other than the transmitter thereof at points outside of such State, and the sale of such facilities is subject to the requirements of Section 203 of the Federal Power Act.

(3) The proposed sale of facilities by the Applicant, upon the terms and conditions contained in the application and the letter submitted by Arizona Edison Company, Inc., on March 10, 1948, and as hereinafter authorized, will be consistent with the public interest.

The Commission orders that:

(A) The proposed sale of facilities referred to in paragraph (a) above, by the Applicant, for the reasons set forth in paragraph (3), above, is hereby authorized and approved, subject to the provisions of this order.

(B) The foregoing authorization is without

prejudice to the authority of this Commission or any other regulatory body, with respect to rates, service, accounts, valuations, estimates or determinations of costs, or any other matter whatsoever pending, or which may come before this Commission, or such other regulatory body, and nothing in this order shall be construed as an acquiescence by this Commission in any estimate or determination of cost or any valuation of property claimed or asserted.

(C) This authorization shall expire unless acted upon within sixty days from the date of this order.

(D) Applicant shall report within ten days after the consummation of the proposed sale, as required by the Rules of Practice and Regulations, and shall file proposed journal entries within six months of the consummation of the proposed sale as required by the Commission's Uniform System of Accounts.

(E) The Commission's order dated February 20, 1948, in this matter and entitled "Order Fixing Date of Hearing on Application for Authority to Sell Facilities and Requiring Purchaser to Show Cause with Respect Thereto," be and the same hereby is vacated.

By the Commission.

/s/ LEON M. FUQUAY,
Secretary.

Date of Issuance: March 11, 1948.

Docketed March 11, 1948.

EXHIBIT F

Federal Power Commission

Docket No. IT-6096

Application of CALIFORNIA ELECTRIC
POWER COMPANY for an Order Under
Section 203 of Federal Power Act Authorizing
the Sale of Facilities in Yuma County, Arizona.

Pursuant to the provisions of 18 C.F.R. 33.8,
California Electric Power Company hereby reports
to the Commission that the sale of facilities covered
by its Application, dated the 17th day of October,
1947, in the above docket, and authorized by Order
of the Commission dated March 11, 1948, was con-
summated on April 1, 1948, in accordance with the
terms and conditions named in the Agreement of
Sale and Purchase, dated October 7, 1947, and
attached to said Application as Exhibit L-1.

Dated at Riverside, California, this 7th day of
July, 1948.

CALIFORNIA ELECTRIC
POWER COMPANY,

By /s/ CARL C. ERNST,
Vice-President.

Attest:

/s/ [Illegible]
Assistant Secretary.

State of California,
County of Riverside—ss.

Carl C. Ernst, being first duly sworn, on oath deposes and says: That he is an officer, to wit, Vice-President of California Electric Power Company, a corporation, applicant above named, and as such verifies this report on behalf of such corporation; that he has read the above and foregoing report and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to those matters that he believes it to be true.

/s/ CARL C. ERNST.

Subscribed and sworn to before me this 7th day of July, 1948.

/s/ L. G. PARK,

Notary Public in and for the County of Riverside,
State of California.

My Commission Expires July 3, 1950.

Docketed July 12, 1948, Federal Power Commission.

EXHIBIT G

Snell, Wilmer, Walsh, Melczer & Beauchamp
Attorneys at Law
Heard Building
Phoenix, Arizona

March 28, 1949.

Leon M. Fuquay, Secretary,
Federal Power Commission,
Washington, D. C.

Dear Sir:

Arizona Edison Company, Inc., has submitted to me, as its General Counsel, copy of "Order to Show Cause" (together with attached engineering "Field Report"), issued February 16, 1949, under Docket No. E-6194 in a proceeding then initiated by the Commission entitled "In the Matter of Arizona Edison Company, Inc."

It is my considered judgment, predicated upon said documents, all relevant facts and the applicable law, and after consultation with other counsel familiar with the Federal Power Act and the administration thereof by the Commission, that the Commission is without jurisdiction in the premises. Accordingly, I have advised by client not to make any response of any kind to the Order or to enter any appearance whatever in the proceeding. This advice, the officials of Arizona Edison after careful consideration have concluded to follow.

This letter is written to you purely as a matter

of courtesy that the Commission may know the position taken by the Company.

Yours very truly,

/s/ FRANK L. SNELL,

Docketed March 31, 1949.

EXHIBIT H

United States of America Federal Power
Commission

Docket No. E-6194

In the Matter of:

ARIZONA EDISON COMPANY, INC.

Before: Commissioners Nelson Lee Smith, Chairman; Thomas C. Buchanan, Claude L. Draper, Leland Olds, and Harrington Wimberly.

April 20, 1949.

ORDER SETTING HEARING

By order dated February 15, 1949, the Commission directed Arizona Edison Company, Inc., (Arizona Edison) within 45 days from the date of service of the order, to show cause, if any there be, why the Commission should not find and determine that Arizona Edison is a "public utility" within the meaning of that term as used in the Federal Power Act, and why, if so determined, it should not comply with the provisions of the Federal Power Act and

the rules and regulations, including the Uniform System of Accounts, promulgated thereunder, applicable to public utilities, and why it should not charge to earned surplus an amount representing excess over depreciated book cost paid by Arizona Edison to California Electric Power Company for the latter company's Arizona properties.

Concurrently with the order of February 15, 1949, the Commission served on Arizona Edison a copy of a report by members of the staff of a field study of the facilities and energy flow on Arizona Edison's system, from which report it appears that Arizona Edison may be a "public utility."

Arizona Edison, through its counsel, advised the Commission by letter dated March 28, 1949, that it would make no response to the order of February 15, 1949, or enter any appearance whatever in the proceeding.

The Commission orders:

(A) A public hearing be held commencing on June 6, 1949, at an hour and place later to be designated, respecting the matters involved and the issues presented in this proceeding.

(B) Interested State commissions may participate as provided by Rules 1.8 and 1.37(f) of the Commission's General Rules and Regulations, including Rules of Practice and Procedure, dated January 1, 1948 [18 CFR 1.8 and 1.37(f)].

By the Commission.

.....,

Leon M. Fuquay, Secretary.

Date of Issuance: April 21, 1949.

EXHIBIT I

United States of America Federal Power
Commission

In the Matters of:

Docket No. E-6194

ARIZONA EDISON COMPANY, INC.

Docket No. E-6212

CENTRAL ARIZONA LIGHT AND POWER
COMPANY.

Before: Commissioners Nelson Lee Smith, Chairman; Thomas C. Buchanan, Claude L. Draper, Leland Olds and Harrington Wimberly.

June 1, 1949.

ORDER FIXING PLACE OF HEARING AND
CONSOLIDATING PROCEEDINGS

By order dated April 20, 1949, the Commission directed that a public hearing be held commencing June 6, 1949, respecting the matters involved and issues presented in the proceeding entitled *In the Matter of Arizona Edison Company, Inc.*, Docket No. E-6194.

By order dated April 20, 1949, in Docket No. E-6212, the Commission directed Central Arizona Light and Power Company to show cause, if any there be, why the Commission should not make the findings and determinations therein set forth, The

order further directed that a public hearing be held commencing on June 6, 1949, respecting the matters involved and the issues presented in that proceeding.

The matters involved and the issues presented in the above-named proceedings are generally inter-related and in many respects identical.

Upon consideration whereof the Commission finds:

It is reasonable, necessary and appropriate in the public interest that those proceedings be consolidated for the purpose of hearing.

The Commission orders:

(A) The above-docketed proceedings be and they hereby are consolidated for purposes of hearing.

(B) The public hearings ordered in Docket No. E-6194 and Docket No. E-6212, as herein consolidated, be held commencing June 6, 1949, at 9:45 a.m. (EDST), in the Hearing Room of the Federal Power Commission, 1800 Pennsylvania Avenue, N. W., Washington, D. C.

By the Commission.

.....,
Leon M. Fuquay, Secretary.

Date of Issuance: June 1, 1949.

EXHIBIT J

Docket No. E-6194,
Arizona Edison Company, Inc.

May 12, 1950.

Arizona Edison Company, Inc.,
Post Office Box 2669,
331 North First Avenue,
Phoenix, Arizona.

Attention: Mr. F. W. Smith, Treasurer

Gentlemen:

A review of the Commission's files indicates that the proposed journal entries as required by paragraph D of the Commission's Order of March 29, 1950, Docket No. E-6194, with reference to purchase of electric plant facilities from California Electric Power Company, have not been received.

Proposed accounting entries relative to this acquisition were required to be filed with the Commission within thirty days from the date of said order. Inasmuch as this period has elapsed, it is requested that these entries be filed at once.

Very truly yours,

LEON M. FUQUAY,
Secretary.

Accts.

LBMRCR.ara

5/10/50

cc: Mr. Rainwater

Mr. Gates

Mr. Marchi

[Stamped]: Received May 11, 1950.

EXHIBIT K

June 9, 1950.

In the Matter of:
Arizona Edison Company, Inc.,
Docket No. E-6194.

Arizona Edison Company, Inc.,
331 North First Avenue,
Phoenix, Arizona.

Gentlemen:

In view of the informal discussions some of the members of the staff have had with your General Counsel, Frank L. Snell, when he was in Washington on behalf of Central Arizona Light and Power Company, I have deferred until now writing with respect to your Company's noncompliance with the Commission's order of March 29, 1950, in the above matter.

Your attention is directed to the fact that more than sixty days have elapsed since that order was entered and more than thirty days since the certified copies of journal entries referred to in Paragraph (D) of the order should have been filed. Furthermore you will note that less than thirty days remain for your completion and filing of your original cost and reclassification studies referred to in Paragraph (B).

According to our records you received a copy of that order on April 5, 1950 (Registry Return Receipt No. 443924), filed no application for rehearing and no petition for extension of time in which to comply, and did not file the certified copies of your journal entries.

I feel that it is appropriate to call these matters to your attention at this time and inquire whether you intend promptly to comply with the Commission's order or whether further action by the Commission will be necessary to secure compliance.

Very truly yours,

/s/ BRADFORD ROSS,

General Counsel.

LE—vc.

6/6/50.

cc: Bur. AF&R, Bur. Power.

Messrs. Ross, Wahrenbrock, Spalter, Easley.
Registered 443248.

Post Office Return Receipt

Name of Sender: Federal Power Commission.

Addressee: Arizona Edison Co.

Signature of Addressee's Agent: Robert C. McKenzie.

Registered Article No.: 443248.

Date of Delivery: June 13, 1950.

EXHIBIT L

Docket No. E-6194,
Arizona Edison Company, Inc.

Jul. 20, 1950.

Arizona Edison Company, Inc.,
331 North First Avenue,
Phoenix, Arizona.

Attention: Mr. Reid Gardner, President.

Gentlemen:

Reference is made to paragraph (B) of the Com-

mission's Order entered March 29, 1950, Docket No. E-6194, which required the company within 90 days from the date of the order to file original cost studies of electric plant in accordance with Electric Plant Accounts Instruction 2-D of the Uniform System of Accounts Prescribed for Public Utilities and Licensees and the Commission's Order of May 11, 1937.

The studies have not been received, and, accordingly, the company is requested to submit the required information immediately. In the event the studies have not been completed, the company should make application to the Commission for an extension of time in which to comply with the Commission's Order. Such application should clearly state the reasons for the delay in the company's compliance and set forth the present plan for completing the required studies.

Very truly yours,

J. H. GUTRIDE,
Acting Secretary.

WHB:RCR:ara

Accts.

7/17/50

cc: Mr. Rainwater

Mr. Brown

[In Margin]: Rec. 7/17/50.

[Initialed]: L.E. 7/19/50.

R.G. 7/19/50.

A.K.S. 7/19/50.

C.V. 7/18.

EXHIBIT M

Docket No. E-6194,
Arizona Edison Company, Inc.

July 27, 1950.

Arizona Edison Company, Inc.,
Post Office Box 2669,
331 North First Avenue,
Phoenix, Arizona.

Attention: Mr. F. W. Smith, Treasurer.

Gentlemen:

Reference is made to the Commission's letter of May 12, 1950, requesting proposed journal entries be filed as required by paragraph D of the Commission's Order of March 29, 1950, Docket No. E-6194, in connection with the purchase of electric plant facilities from California Electric Power Company.

As of this date, these accounting entries have not been received. Paragraph D of the above-mentioned order specifically states that the journal entries requested be submitted within thirty days from the date of said order. Inasmuch as this

period has elapsed, these entries should be filed without delay.

Very truly yours,

J. H. GUTRIDE,
Acting Secretary.

Accts.

LBM:RCR:lw

7/25/50.

cc: Mr. Rainwater.

Mr. Gates.

Mr. Marchi.

[Initialed]: R.A.G. 7/27/50.

W.S.

EXHIBIT N

Arizona Edison Company, Inc.,
331 North First Avenue,
Phoenix, Arizona.

Feb. 16, 1949.

Re: Arizona Edison Company, Inc.,
Docket No. E-6194.

Gentlemen:

Enclosed is the order entered by the Commission on February 15, 1949, in the above-entitled matter.

Very truly yours,

LEON M. FUQUAY,
Secretary.

Enclosure, Registered:
Staff Report.

Copy of order sent to:

California Electric Power Company, P. O. Box
512, Riverside, California.

Securities and Exchange Commission, 425 Sec-
ond Street, N. W., Washington, D. C.

cc: Regional Office: San Francisco, California
Law; Publications; Power; AFR.

ES:en 2/16/49

443257

EXHIBIT O

Post Office Return Receipt

Name of Sender: Federal Power Commission.

Addressee: Arizona Edison Co.

Signature of Addressee's Agent: L. S. Beck

Registered Article No. 443257.

Date of Delivery: Feb. 21, 1949.

EXHIBIT P

Arizona Edison Company, Inc.,
331 North First Avenue,
Phoenix, Arizona.

Apr. 21, 1949.

Re: Arizona Edison Company, Inc.
Docket No. E-6194.

Dear Sir:

Enclosed is the order entered by the Commission
on April 20, 1949, in the above-entitled matter.

Very truly yours,

LEON M. FUQUAY,
Secretary.

Enclosure
Registered.

Copy of order sent to:

Acme Reporting Co., 1748 Pennsylvania Ave-
nue, N. W., Washington, D. C.

California Electric Power Co., P. O. Box 512,
Riverside, California.

Frank L. Snell, Esq.; Messrs. Snell, Wilmer,
Walsh, Melczer and Beauchamp, Heard
Bldg., Phoenix, Arizona (for Arizona Edi-
son).

Securities and Exchange Comm., 425 Second
St., N. W., Washington, D. C.

Corp. Comm. of Arizona, Phoenix, Arizona.

Hon. Dan E. Garvey, Gov. of Arizona, Phoenix,
Arizona.

Public Service Comm. of Nevada, Carson City,
Nevada.

Hon. Vail Pittman, Gov. of Nevada, Carson
City, Nevada.

Public Utilities Comm. of California, San
Francisco 2, California.

Hon. Earl Warren, Gov. of California, Sacra-
mento, California.

CC: Reg. Off. San Francisco
Law—Pubs.—AFR—Power

ES:dlp—4/20/49
443611

Docketed April 21, 1949.

EXHIBIT Q

Post Office Return Receipt

Name of Sender: Federal Power Commission.

Addressee: Arizona Edison Co.

Signature of Addressee's Agent: H. Preisner.

Registered Article No.: 443611.

Date of Delivery: April 26, 1949.

EXHIBIT R

Arizona Edison Company, Inc.,
331 North First Avenue,
Phoenix, Arizona.

Re: Arizona Edison Company, Inc.
Docket No. E-6194.
Central Arizona Light and Power Company,
Docket No. E-6612.

Gentlemen:

Enclosed is the order entered by the Commission
on June 1, 1949, in the above-entitled matters.

Very truly yours,

LEON M. FUQUAY,
Secretary.

Enclosure
Registered

Same letter sent Registered to:

Central Arizona Light and Power Company,
Title and Trust Building, Phoenix, Arizona.

Copy of order sent to:

Acme Reporting Company, 1748 Pennsylvania
Avenue, N. W., Washington, D. C.

California Electric Power Co., P. O. Box 512,
Riverside, California.

Frank L. Snell, Esq.; Messrs. Snell, Wilmer,
Walsh, Melczer and Beauchamp, Attys.,
Heard Building, Phoenix, Arizona (for
appli.).

Securities and Exchange Comm., 425 Second
St., N. W., Washington, D. C.

Salt River Valley Water Users Assoc., 2nd Ave. & Van Buren St., Phoenix, Arizona.
Arizona Power Co., 107 North Cortez St., Prescott, Arizona.

(2) Bureau of Reclamation.

Corp. Comm. of Arizona, Phoenix, Arizona.

Hon. Dan E. Garvey, Gov. of Arizona, Phoenix, Arizona.

Public Utilities Comm. of California, San Francisco, California.

Hon. Earl Warren, Gov. of California, Sacramento, California.

Public Service Comm. of Nevada, Carson City, Nevada.

Hon. Vail Pittman, Gov. of Nevada, Carson City, Nevada.

The Tucson Gas, Electric Light and Power Co., 81 North Stone Avenue, Tucson, Arizona.

CC: Reg. Off.: San Francisco

Law—Pubs.—AFR—Power—Orig. Cost.

ES:dlp—6/1/49

443464

Docketed June 1, 1949.

EXHIBIT S

Post Office Return Receipt

Name of Sender: Federal Power Commission.

Addressee: Arizona Edison Co.

Signature of Addressee's Agent: Jeane Ericson.

Registered Article No.: 443464.

Date of Delivery: June 6, 1949.

EXHIBIT T

Arizona Edison Company, Inc.,
331 North First Avenue,
Phoenix, Arizona.

Sept. 23, 1949.

Re: Arizona Edison Company, Inc.

Docket No. E-6194.

Central Arizona Light and Power Company,
Docket No. E-6212.

Gentlemen:

There is enclosed, pursuant to Rule 30 of the Commission's Rules of Practice and Procedure, the Presiding Examiner's Decision in the above-entitled matter.

Very truly yours,

LEON M. FUQUAY,
Secretary.

Enclosure
Registered

Same letter sent to: (Registered)

Central Arizona Light and Power Company,
Title & Trust Bldg., Phoenix, Arizona.

Same letter delivered to:

Leonard D. Easley, Esq., Federal Power Commission,
Washington, D. C.

Abraham R. Spalter, Esq., Federal Power Commission,
Washington, D. C.

Received the above Decision:

/s/ LEONARD D. EASLEY,

Date.....

/s/ ABRAHAM R. SPALTER,

Date.....

Copy of Decision sent to:

Salt River Valley Water Users Association,
2nd Avenue & Van Buren Street, Phoenix,
Arizona.

Securities and Exchange Commission, 425 - 2nd
St., N. W., Washington, D. C.

Arizona Power Company, 107 North Cortez
Street, Prescott, Arizona.

Arizona Corporation Commission, Phoenix,
Arizona.

Public Utilities Commission of California, San
Francisco, California.

Public Service Commission of Nevada, Carson
City, Nevada.

(2) Bureau of Reclamation.

The Tucson Gas, Electric Light & Power Co.,
81 N. Stone Ave., Tucson, Arizona.

Frank L. Snell, Esq., Heard Bldg., Phoenix,
Arizona (Central Arizona).

California Electric Power Company, P. O. B.
512, Riverside, California.

Harry A. Poth Jr., Esq., Reid & Priest, 1518
K St., N. W., Washington, D. C.

cc: Regional Office—San Francisco, Law, Publications, AFR, Power, Original Cost 1—Chief Examiner 2—Secretary.

443879

Docketed September 23, 1949.

EXHIBIT U

Post Office Return Receipt

Name of Sender: Federal Power Commission.
Addressee: Arizona Edison Co.
Name of Addressee's Agent: Robert C. McKenzie.
Registered Article No.: 443879.
Date of Delivery: Sept. 27, 1949.

EXHIBIT V

Certificate of Service

I hereby certify that I have today served the foregoing "Exceptions of Commission's Staff to Decision of Presiding Examiner" by mailing a copy thereof properly addressed to each of the companies and persons listed below.

/s/ ABRAHAM R. SPALTER.

Central Arizona Light and Power Company, Title and Trust Building, Phoenix, Arizona.

Arizona Edison Company, Inc., 331 North First Avenue, Phoenix, Arizona.

Snell, Wilmer, Walsh, Melczer & Beauchamp, Heard Building, Phoenix, Arizona.

Washington, D. C., October 12, 1949.

EXHIBIT W

Arizona Edison Company, Inc.,
331 North First Avenue,
Phoenix, Arizona.

Mar. 31, 1950.

Re: Arizona Edison Company, Inc.

Docket No. E-6194.

Central Arizona Light and Power Company,
Docket No. E-6212.

Gentlemen:

Enclosed is a copy of Opinion No. 190 and order entered by the Commission on March 29, 1950, in the above-entitled matters.

Very truly yours,

LEON M. FUQUAY,
Secretary.

Enclosure

Same letter sent Registered to:

Central Arizona Lt. and Pwr. Co., Title and
Trust Bldg., Phoenix, Arizona.

Frank L. Snell, Esq.; Messrs. Snell, Wilmer,
Walsh, Melczer & Beauchamp, Heard Bldg.,
Phoenix, Arizona (Cent. Arizona Lt. & Pwr.).

Copy of Opinion and Order sent to:

California Elec. Pwr. Co., P. O. Box 512, Riv-
erside, California.

The Tucson Gas, Elec. Lt. & Pwr. Co., 81 North
Stone Ave., Tucson, Arizona.

Corp. Comm. of Arizona, Phoenix, Arizona.

Pub. Serv. Comm. of Nevada, Carson City,
Nevada.

Pub. Utils. Comm. of California, San Fran-
cisco 2, California.

Securities and Exchange Comm., 425 - 2nd St.,
N. W., Washington, D. C.

Harry A. Poth, Jr.; Messrs. Reid and Priest,
1518 K St., N. W., Washington, D. C.

Salt River Valley Wtr. Users Assn., 2nd Ave.
& Van Buren St., Phoenix, Ariz.

Arizona Pwr. Co., 107 North Cortez St., Pres-
cott, Arizona.

(2) Bureau of Reclamation.

cc: Reg. Off.: San Francisco—Law—Pubs.—AFR—
Power—Original Cost.

ES:ng—3/30/50

Registered: 443924

443925

443926

EXHIBIT X

Post Office Return Receipt

Name of Sender: Federal Power Commission.

Addressee: Arizona Edison Co.

Name of Addressee's Agent: Robert C. McKenzie.

Registered Article No.: 443924.

Date of Delivery: April 5, 1950.

[Endorsed]: Filed August 31, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT

Comes now Defendant, Arizona Edison Company, Inc., and makes application to the Court for an order dismissing the Complaint herein and other relief; and as grounds for its said application respectfully represents to the Court:

I.

Said Complaint does not allege facts which state any claim or claims upon which Plaintiff, Federal Power Commission, is entitled to relief or upon which relief can be granted.

II.

It appears affirmatively on the face of the Complaint that the Plaintiff Commission at all times in said Complaint mentioned lacked and now lacks jurisdiction over the subject matter with respect to which a decree of enforcement by this Court is sought in this action.

III.

It appears affirmatively on the face of the Complaint that the Plaintiff Commission has imposed sanctions upon Defendant and issued substantive rules and orders of command against Defendant in excess of jurisdiction delegated to said Commission and authorized by law in that Defendant does not own or operate any facilities for transmission of electric energy in interstate commerce; that all facilities owned or operated by Defendant for the

transportation of electric energy are situate within the State of Arizona; that said Defendant Company, an Arizona corporation, even as set forth in the Order and Opinion of Plaintiff (Exhibit A), is engaged solely in the State of Arizona in the business of transmitting electric energy, and distributing and selling it at retail to supply ultimate consumers served by it in its various systems scattered locally through Central and Southern Arizona; that all facilities owned or operated by Defendant referred to in said Complaint are facilities used in local distribution or only for the transmission of electric energy in intrastate commerce; and that all the matters which the Plaintiff Commission seeks to regulate by its said Order and Opinion (Exhibit A attached to Complaint) are subject to and now regulated by the State of Arizona.

IV.

It appears affirmatively on the face of the Complaint that the Plaintiff Commission at all times in said Complaint mentioned lacked and now lacks jurisdiction over the person of Defendant, Arizona Edison Company, Inc., in and with respect to any and all Commission proceedings specifically referred to in said Complaint, including the Commission Order and Opinion No. 190 which is a part hereof and enforcement of which herein is sought.

V.

It appears affirmatively on the face of the Complaint that the Plaintiff Commission at all times

in said Complaint mentioned lacked and now lacks any authority or power whatever under law: to initiate the purported jurisdictional proceedings of February 16, 1949, entitled "Order to Show Cause" (Exhibit B, attached to Complaint); to make the purported service thereof upon Defendant (Exhibit O, attached to Complaint); to issue or make the purported service upon Defendant of any of the orders and other documents referred to in Paragraph 16 of the Complaint (Exhibits Q, S, U and X, attached to said Complaint); or to make, enter and promulgate the said "Commission Order, and Opinion No. 190," which is a part thereby (Exhibit A, attached to Complaint).

Wherefore, Defendant prays that an order be entered dismissing the Complaint of Plaintiff, that Plaintiff take nothing by its said Complaint, and for such other and further relief as to the Court may seem proper in the premises.

SNELL & WILMER,

By /s/ JAMES A. WALSH,

Attorneys for Defendant.

LEE, SHAW & McCREERY,

By /s/ DONALD McCREERY,

Of Counsel.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

1. The Plaintiff Commission, in judicial enforcement proceedings, must establish its authority and jurisdiction to issue the order sought to be enforced.

Federal Power Commission vs. Panhandle Eastern Pipe Line Co., 172 F. 2d 57, 60 (C.C.A. 3, 1949).

Federal Power Commission vs. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 515 (1949); 93 L. Ed. 1499, 1510; 69 S. Ct. 1251.

Jaeger vs. Simrany, 180 F. 2d 650, 653 (C.C.A. 9, 1950).

Federal Power Commission vs. Metropolitan Edison Co., 304 U.S. 375, 386 (1938); 82 L. Ed. 1408, 1415.

East Ohio Gas Co. vs. Federal Power Commission, 115 F. 2d 385, 387 (C.C.A. 6, 1940).

United Gas Pipe Line Co. vs. Federal Power Commission, 181 F. 2d 796, 800 (C.A.D.C., 1950).

2. The powers of the Plaintiff Commission are limited and circumscribed by the terms of the Federal Power Act.

Stark vs. Wickard, 321 U.S. 288, 309, 310 (1944); 88 L. Ed. 733, 747, 748; 64 S. Ct. 559, 571.

Jaeger vs. Simrany, 180 F. 2d 650, 653 (C.C.A. 9, 1950).

3. The Plaintiff Commission cannot enlarge its powers by the adoption of rules and regulations.

Jaeger vs. Simrany, 180 F. 2d 650, 652 (C.C.A. 9, 1950).

L. & N. R. Co. vs. U. S., 282 U.S. 740, 758, 759 (1931); 75 L. Ed. 672, 684; 51 S. Ct. 297, 304.

Jones vs. Securities and Exchange Commission, 298 U.S. 1, 18, 19 (1936); 80 L. Ed. 1015, 1022; 56 S. Ct. 654.

4. The Plaintiff Commission cannot assume power and authority not delegated to it by law under the guise of statutory construction or assertion of alleged Congressional intent.

National Labor R. Bd. vs. Continental Oil Co., 179 F. 2d 553, 555 (C.C.A. 10, 1950).

Jaeger vs. Simrany, 180 F. 2d 650, 653 (C.C.A. 9, 1950).

Western Union Telegraph Co. vs. Lenroot, 323 U.S. 490, 508, 509 (1945); 89 L. Ed. 414, 426, 427.

United States vs. Youngstown Sheet & Tube Co., 171 F. 2d 103, 110, 111 (C.C.A. 6, 1948).

5. The Plaintiff Commission in the proceedings had by it culminating in its Opinion and Order No. 190 was without jurisdiction over the person of Defendant under the terms of the Federal Power Act. All of such proceedings and procedures di-

rected against Defendant, as described in the Complaint, were in excess of the authority delegated to the Plaintiff Commission or authorized by law.

Federal Power Act, Sections 1, 201, et seq.
(Title 16, U.S.C.A., Ch. 12, Secs. 792, 824, et seq.).

Administrative Procedure Act (Title 5, U.S. C.A., Ch. 19, Secs. 1001, et seq.).

6. The Plaintiff Commission at all times mentioned in the Complaint was, and now is, without power, authority or jurisdiction of or over the subject matter, to wit, the facilities of Defendant or Defendant as the owner or operator thereof.

Connecticut Light & P. Co. vs. Federal Power Commission, 324 U.S. 515 (1945); 89 L. Ed. 1150; 65 S. Ct. 749.

Federal Power Act. Sec. 201 (Title 16, U.S. C.A., Ch. 12, Sec. 824).

Administrative Procedure Act. Sec. 9(a) (Title 5, U.S.C.A., Ch. 19, Sec. 1008(a)).

Georgia Power Co. vs. T.V.A., 14 F. Supp. 673 (D.C.Ga., 1936).

Respectfully submitted,

SNELL & WILMER,

By /s/ JAMES A. WALSH,

Attorneys for Defendant.

LEE, SHAW & McCREERY,

By /s/ DONALD S. McCREERY,

Of Counsel.

[Endorsed]: Filed September 19, 1950.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The Plaintiff, Federal Power Commission, moves the Court for summary judgment herein, for the following reasons, as more fully set forth in its memorandum of authorities filed herewith:

1. There is no genuine issue as to any material fact set forth in the Complaint herein and on those facts Plaintiff, as a matter of law, is entitled to a judgment as prayed for in the Complaint.

2. The contentions advanced by the Defendant in its Motion to Dismiss constitute an attempt to obtain a re-examination of matters lawfully determined by the Commission, which may not be had in this proceeding.

3. This Court has no jurisdiction to review the Plaintiff's order of March 31, 1950, entered after due notice to the Defendant and to the public and after public hearing, finding the Defendant to be a "public utility" within the meaning of that term as used in the Federal Power Act (16 U.S.C. §791a, et seq.) and directing the Defendant to take the actions referred to in paragraph 14 of the Complaint herein. The validity of that order of March 31, 1950, was properly reviewable exclusively in the manner provided in Section 313 of the Federal Power Act (16 U.S.C. §8251).

Wherefore, Plaintiff prays for judgment and an order and decree as prayed in its Complaint.

. /s/ BRADFORD ROSS,
 General Counsel;

 /s/ HOWARD E.
 WAHRENBROCK,
 Assistant General Counsel;

 /s/ REUBEN GOLDBERG,
 Attorney;

 /s/ ABRAHAM R. SPALTER,
 Attorney,
 Counsel for Plaintiff.

Of Counsel:

 THEODORE FRENCH.

October, 1950.

Certificate of Service

I have this day served the attached Motion for Summary Judgment upon the Defendant, Arizona Edison Company, Inc., by mailing copies thereof to James A. Walsh, Esq., of Snell & Wilmer, 703 Heard Building, Phoenix, Arizona, and to Donald McCreery, Esq., of Lee, Shaw & McCreery, 1217 First National Bank Building, Denver, Colorado, its attorneys of record.

October 5, 1950, Washington, D. C.

 /s/ BRADFORD ROSS,
 Counsel for Plaintiff.

[Endorsed]: Filed October 7, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF
HOWARD E. WAHRENBROCK

State of Arizona,
County of Maricopa—ss.

Howard E. Wahrenbrock, being duly sworn, on oath deposes and says that he is Assistant General Counsel of the Federal Power Commission; that he, or an attorney working under his immediate and direct supervision, has compared the documents which are appended as Exhibits A through Exhibit X to the complaint, with originals thereof appearing in the official files of the Commission, and that in every instance has found that they are true and correct copies, except in one particular: The originals have the signatures as indicated on each of the following pages: p. 24, Exhibit A; p. 31, Exhibit A; p. 42, Exhibit H; p. 43, Exhibit I;

That he is familiar with the mailing and filing procedures of the Federal Power Commission and that the presence of the aforesaid documents in the Commission's files means that the orders, of which copies are set forth, were duly adopted and issued, the letters signed by the Commission's Secretary, Acting Secretary, and General Counsel, of which copies are shown, were duly mailed to the addresses shown on the dates shown thereon, but without the dictator's and other initials thereon, and statements of distribution of copies; that the return registry receipts pertain to the letters bearing the corre-

sponding identifying serial numbers; that the certificate of service (p. 57) was duly executed; and that the letter addressed to the Commission (p. 36) was duly received on the date shown.

/s/ HOWARD E.

WAHRENBROCK.

Subscribed and sworn to before me this 9th day of November, 1950.

[Seal] /s/ AURELIA E. HULL,
Notary Public.

My commission expires 6-22-52.

Receipt of copy acknowledged.

[Endorsed]: Filed November 9, 1950.

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF JANUARY 19, 1951
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

Plaintiff's Motion for Summary Judgment and Defendant's Motion to Dismiss having been argued, submitted and by the Court taken under advisement,

It Is Ordered that said Plaintiff's Motion for Summary Judgment be and it is denied and that said Defendant's Motion to Dismiss be and it is granted.

Entered in Civil Docket January 19, 1951.

Federal Power Commission
Washington 25

March 2, 1951.

James A. Walsh. Esq.,
703 Heard Building,
Phoenix, Arizona.

Donald S. McCreery, Esq.,
1217 First National Bank Building,
Denver, Colorado.

Re: Civ-1528 Phx., Federal Power Commis-
sion v. Arizona Edison Company, Inc.

Gentlemen:

The Court having granted your motion to dismiss our complaint and having denied our motion for summary judgment, we shall stand on our complaint. Accordingly, we shall be glad to review the draft of judgment you prepare, for approval as to form, in accordance with the Court's Rule No. 22. We would like to do this and take all the steps necessary to perfect our appeal at an early date.

Very truly yours,

/s/ BRADFORD ROSS,
General Counsel.

cc: Clerk of the United States District Court for
District of Arizona.

[Stamped]: March 6, 1951.

In the United States District Court
for the District of Arizona

Civ. 1528 Phx.

FEDERAL POWER COMMISSION,
Plaintiff,

vs.

ARIZONA EDISON COMPANY, INC.,
Defendant.

JUDGMENT OF DISMISSAL

This matter coming on for entry of final judgment pursuant to order of the Court January 19, 1951, denying plaintiff's motion for summary judgment and granting defendant's motion to dismiss, and

It appearing to the Court and the Court finds that plaintiff Commission has filed with the Clerk of this Court its election to stand upon its complaint, evidenced by Commission letter of date March 2, 1951, to said Clerk; and the Court now being sufficiently and fully advised in the premises:

It Is Ordered, Adjudged and Decreed that plaintiff's complaint and this proceeding be and the same hereby are dismissed with prejudice.

Done in Open Court this 2nd day of April, 1951.

/s/ DAVE W. LING,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and docketed April 2, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Federal Power Commission, plaintiff-appellant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of Dismissal of this Court entered in this action on April 2, 1951, granting the Motion to Dismiss filed by Arizona Edison Company, Inc., defendant-appellee above named, and denying the Motion for Summary Judgment filed by the plaintiff-appellant in the above-entitled case.

/s/ BRADFORD ROSS,
General Counsel, Federal Power Commission,
Washington 25, D. C., Counsel for Appellant
Federal Power Commission.

[Endorsed]: Filed April 23, 1951.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of

Federal Power Commission, Plaintiff, vs. Arizona Edison Company, Inc., Defendant, numbered Civ-1528 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the minute entries, constitute the entire record on appeal in said case, as designated in the Appellant's Designation filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Plaintiff's Complaint and exhibits thereto, filed August 31, 1950.
2. Praecipe for Summons, filed August 31, 1950.
3. Summons and Marshal's Return, filed September 14, 1950.
4. Defendant's Motion to Dismiss, filed September 19, 1950.
5. Plaintiff's Motion for Summary Judgment, filed October 7, 1950.
6. Affidavit of Counsel for Plaintiff, filed November 9, 1950.
7. Minute entry of January 19, 1951 — Order

denying plaintiff's Motion for Summary Judgment and granting Defendant's Motion to Dismiss.

8. Copy of letter from Counsel for Plaintiff to Counsel for Defendant indicating election to stand on complaint, dated March 2, 1951.

9. Plaintiff's Notice of Appeal from Order of January 19, 1951, filed March 19, 1951.

10. Judgment of Dismissal, entered, filed and docketed April 2, 1951.

11. Plaintiff's Notice of Appeal from Judgment of Dismissal, filed April 23, 1951.

12. Minute entry of April 26, 1951—order extending time for filing record on appeal and docketing appeal to and including June 17, 1951.

13. Plaintiff's Designation of Contents of Record on Appeal, filed April 30, 1951.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$4.80 and that a memorandum of said sum has been entered in the civil docket as a constructive earning for services performed on behalf of the United States.

Witness my hand and the seal of said Court this 17th day of May, 1951.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 12941. United States Court of Appeals for the Ninth Circuit. Federal Power Commission, Appellant, vs. Arizona Edison Company, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed May 19, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12941

FEDERAL POWER COMMISSION,

Appellant,

vs.

ARIZONA EDISON COMPANY, INC.,

Appellee.

STATEMENT OF POINTS

1. The District Court had jurisdiction, under Section 317 of the Federal Power Act (16 U.S.C., § 825p), over violations of that Act and of rules, regulations, and orders thereunder and over an action brought to enforce duties created by, and to enjoin violations of, that Act and rules, regulations, and orders thereunder.

2. An action to enforce such duties and enjoin such violations was authorized by Section 317 of that Act to be brought by Appellant, Federal Power Commission, in the United States District Court for the District of Arizona against Appellee, Arizona Edison Company, Inc., as an inhabitant of that District.

3. An action would lie under that Act, and particularly under Section 314 thereof (16 U.S.C. § 825m), to enjoin a practice of failing and refusing to comply with that Act and with rules, regulations and orders thereunder, and to enforce compliance

with that Act and with such rules, regulations and orders.

4. The Complaint stated a cause of action under that Act, and, in particular, under Section 314 thereof.

5. The proceeding before the Appellant, Federal Power Commission, in which the order of March 31, 1950, was entered, as alleged in the Complaint, was such a proceeding as that Commission was authorized to conduct under the Federal Power Act, and in particular under Sections 203, 301, and 309, thereof (16 U.S.C. § 824b, 825, and 825h). That proceeding was one particularly authorized—

a. Insofar as it was a proceeding to determine that a particular electric utility company, such as Appellee, Arizona Edison Company, Inc., is a “public utility” within the meaning of the Federal Power Act, and, in particular, Section 201 thereof (16 U.S.C. §824), and that it is subject to the requirements applicable to “public utilities” in such Act and in rules, regulations and orders thereunder;

b. Insofar as it was a proceeding to require such a “public utility” to comply with previously formulated mandatory orders, rules and regulations addressed generally to all such “public utility” to comply with previously formulated mandatory orders, rules and regulations addressed generally to all such “public utilities”; and

c. Insofar as it was a proceeding to deter-

mine the accounts in which particular outlays shall be entered or charged by such a "public utility."

6. It was unnecessary, in order to state a cause of action, that the Complaint allege the findings made by the Commission in its order of March 31, 1950, and the legal sufficiency of those findings to support that order is not reviewable by the District Court and may not be brought in issue before that Court in a proceeding to enforce that order; being exclusively reviewable in proceedings brought in United States Courts of Appeals as provided in Section 313 of the Federal Power Act (16 U.S.C. § 825L); or, if such allegation was necessary, those findings, as alleged, were legally sufficient, and specifically——

a. The findings of fact in paragraphs (1) and (3) to (13), inclusive, of the Commission's order of March 31, 1950, and as further set forth in the Commission's Opinion No. 190 (incorporated by reference and made a part of the order) under the headings "Facilities and Operations, Arizona Edison," and "Discussion," are legally sufficient under the Federal Power Act, and, in particular, under Section 201 thereof (16 U.S.C. § 824), to support the conclusions in paragraph (14) of the order that Appellee, Arizona Edison Company, Inc., owns and operates facilities subject to the jurisdiction of the Commission and is therefore a "public utility" within the meaning, and subject to the requirements, of the Act and the

rules, regulations, and orders thereunder addressed generally to all "public utilities"; also legally sufficient to support the provisions of paragraphs (A) and (B) of the order insofar as they pertain to Appellee, Arizona Edison Company, Inc.

b. The findings of fact in paragraph (29) of the order are legally sufficient under the Federal Power Act, and, in particular, under Section 201 thereof (16 U.S.C. § 824), to support the conclusion in that paragraph that Appellee, Arizona Edison Company, Inc., was and had been such a "public utility" since prior to its acquisition of facilities from California Electric Power Company on April 1, 1948.

c. The findings of fact in paragraphs (25) to (28), inclusive, and (30), of the order of March 31, 1950, and as further set forth in Opinion No. 190 under the headings "Background of Proceedings, Arizona Edison," and "Discussion" (last three paragraphs), are legally sufficient under the Federal Power Act, and, in particular, under Sections 203, 301, and 309 thereof (16 U.S.C. §§824b, 825, and 825h), to support the conclusions in paragraph (30) and the requirements (C) and (D) of the order, with respect to the accounting treatment of the amounts there referred to.

7. The question whether the facts support such an order is not determinable by the District Court as if presented for its decision initially.

8. All applicable statutory and constitutional requirements were fully satisfied by the notice accorded to Appellee, Arizona Edison Company, Inc., as alleged in the Complaint, with respect to: the initiation of the Commission proceeding in which the order of March 31, 1950, was entered, the setting of the hearing in that proceeding, the time and the place of such hearing, the consolidation of proceedings for purposes of that hearing, the Trial Examiner's Decision, the Commission staff counsel's exceptions to the Trial Examiner's Decision, and the Opinion, Findings and Order of the Commission.

9. It was unnecessary, in order to state a cause of action, that the Complaint allege that opportunity to be heard, with respect to the order of March 31, 1950, had been accorded Appellee, Arizona Edison Company, Inc., and the legal sufficiency of the opportunity to be heard accorded Appellee is not reviewable by the District Court and may not be brought in issue before that Court in a proceeding to enforce that order, being exclusively reviewable in proceedings brought in United States Courts of Appeals as provided in Section 313 of the Federal Power Act (16 U.S.C. § 825L); or, if such allegation was necessary, the opportunity alleged in the Complaint fully satisfied all applicable statutory and constitutional requirements.

10. It was unnecessary, in order to state a cause of action, that the Complaint allege facts from which the District Court could find that Appellee is a "public utility" under the Federal Power Act.

11. It was unnecessary, in order to state a cause of action, that the Complaint allege the evidence before the Commission supporting the findings and order of the Commission, and the factual sufficiency of that evidence could not be brought into issue in a proceeding to enforce the order, being exclusively reviewable in proceedings brought in United States Courts of Appeals as provided in Section 313 of the Federal Power Act (16 U.S.C. § 825L).

12. The Appellee's failure and refusal to comply with the order of March 31, 1950, its acts and practices constituting violations of that order, and the continuance of such acts and practices unless enjoined, all as alleged in the Complaint, are sufficient to entitle Appellant, Federal Power Commission, to a Court order as prayed for in the Complaint, directing compliance with the Appellant's order of March 31, 1950, and enjoining continuation of Appellee's violation thereof.

13. There was no genuine issue as to any material fact alleged in the Complaint, all such facts being matters of official record with the Appellant, Federal Power Commission, as established before the District Court by uncontroverted affidavit.

14. Appellee's motion to dismiss should have been denied.

15. Appellant's motion for summary judgment should have been granted.

16. The Complaint and proceeding should not have been dismissed.

17. The relief prayed for in the Complaint should have been granted.

18. This Court should reverse the granting of the motion to dismiss, the denial of Appellant's motion for summary judgment, and the dismissal, "with prejudice," of the Complaint and the proceedings, and should direct the District Court to grant the relief prayed for in the Complaint.

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Assistant General Counsel,

/s/ LEONARD EASLEY,

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Certificate of service attached.

[Endorsed]: Filed June 4, 1951.

No. 12941

**In the United States Court of Appeals
for the Ninth Circuit**

FEDERAL POWER COMMISSION, APPELLANT

v.

ARIZONA EDISON COMPANY, INC., APPELLEE

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA**

BRIEF FOR APPELLANT

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In the United States Court of Appeals for the Ninth Circuit

No. 12941

FEDERAL POWER COMMISSION, APPELLANT

v.

ARIZONA EDISON COMPANY, INC., APPELLEE

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT AND INTRODUCTION

This is an appeal by the Federal Power Commission under Section 128 of the Judicial Code (28 U. S. C. 1291) from a judgment of the United States District Court, District of Arizona, entered April 2, 1951 (R. 89). Notice of the appeal was filed April 23, 1951 (R. 90); the record on appeal was filed in this Court May 19, 1951 (R. 90-93); and the Commission's statement of points was filed June 4, 1951 (R. 94-100).

The judgment appealed from was one dismissing a proceeding on the Commission's Complaint (R. 3-77) brought under Sections 314 (a), 314 (b), and 317 of the Federal Power Act¹ and seeking Court enforcement of a Commission order, issued March 31, 1950 (R. 14-41), insofar as that order related to Arizona Edison Company, Inc.² The dismissal followed the

¹ 16 U. S. C. §§ 825m (a), 825m (b), and 825p. In lieu of printing as an appendix to this brief the numerous provisions of the Act, which we cite, we are lodging with the Clerk printed pamphlet copies of the Act, for more convenient reference.

² The Commission's order was entered in a consolidated proceeding and also related to Central Arizona Light and Power Company, which has undertaken to comply with the order insofar as it related to that Company.

granting of the Company's motion to dismiss (R. 78-80) and denial of the Commission's motion for summary judgment (R. 84-85), when the Commission elected to stand on the Complaint (R. 88).

The March 31, 1950, order which the Commission sought to have enforced is one in which the Commission concluded from the facts found by it that the Company was subject to regulation as a "public utility" within the special meaning of that term as used in the Federal Power Act and directed it to comply with outstanding regulations generally applicable to every such "public utility" (R. 40).³ It particularly directed compliance with the Commission's uniform accounting requirements and ordered certain specific accounting entries on the basis of its findings (R. 40-41). Those entries related to the Company's expenditures for certain utility facilities which had been sold to it April 1, 1948, by another "public utility" (California Electric Power Company) under a Commission authorization (R. 6, 16, 42, 50-54) which, with the Company's agreement, had reserved the questions of the Company's public utility status and method of accounting for its expenditures.

The District Court rendered no opinion and provided no explanation, written or oral, of any of its actions. Presumably, it agreed, at least in part, with the Company (R. 78-83) that the Commission had no statutory authority to issue an order establishing that an electric utility like the Company is subject to regulation under the Act as a "public utility," or to conduct a proceeding for determination of that question. This, notwithstanding that the question was one of coverage of the Act administered by the Commission and a technical question of the kind usually regarded as peculiarly suited to administrative determination in the first instance. For "public utility" status under the Act depended on whether the Company "owned or operated facilities" (other than "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce") for the "transmission of electric energy" which is "transmitted from a State [here Nevada and

³ The order is in form similar to those which have frequently been reviewed and sustained by the courts. See *infra*, pp. 16-17.

California, respectively] and consumed at any point outside thereof [here, in Arizona].”⁴

The only specific ground in the Company’s motion for its claim that the Commission was not authorized to determine the Company’s “public utility” status, is a reference (R. 79) to the Commission’s identification of the Company (R. 15) as follows:

Arizona Edison is an Arizona corporation with its principal office in Phoenix, Arizona. It is engaged, solely in the State of Arizona, in the business of transmitting electric energy, and distributing and selling it at retail. * * *

Apparently the Company concludes from this that it is not a “public utility” and that the Commission does not have jurisdiction to reach a different conclusion.

The motion did not question the venue or jurisdiction of the District Court to enforce the order of the Commission, if the order was one within the Commission’s authority. Neither did it question that the violations alleged would entitle the Commission to Court enforcement, as prayed in the Complaint, if the order was within the Commission’s authority. R. 78–83.

STATEMENT OF THE CASE

The facts are found in the allegations of the Complaint (R. 3–77) and supported by affidavit (R. 86–87). They are largely matters of record in the official records of the Commission. For the purposes of the motion to dismiss, the allegations are, of course, deemed to be admitted. For the purposes of the motion for summary judgment, there was no

⁴ Insofar as here relevant, Section 201 (e) defines “public utility” as meaning “any person who owns or operates facilities subject to the jurisdiction of the Commission.” Such facilities are described in Section 201 (b) as including facilities for “transmission of electric energy in interstate commerce” but not including (except as specifically so provided) “facilities used in local distribution or only for the transmission of electric energy in intrastate commerce,” among others. See *Jersey Central P. & L. Co. v. F. P. C.*, 319 U. S. 61; *Connecticut L. & P. Co. v. F. P. C.*, 324 U. S. 515; cf., *F. P. C. v. East Ohio Gas Co.*, 338 U. S. 464. The statute further provides that “electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof” (Section 201 (c)).

genuine issue as to any of the facts alleged, the supporting affidavit being entirely uncontroverted.

In summary those facts are as follows.

The Commission Proceedings

The question of the Company's duty to comply with requirements of the Federal Power Act, and of regulations thereunder, which in terms apply to every "public utility," arose when the Commission had under consideration an application of another "public utility," California Electric Power Company, for authorization to transfer certain of its facilities to Appellee, Arizona Edison Company, Inc. (R. 5, 46).⁵ To avoid delaying Commission approval of the transfer until Arizona Edison's "public utility" status under the Act could be determined, Arizona Edison had agreed to set up a special reserve assuring compliance with such conditions as the Commission might attach to the Company's acquisition of the facilities, if it should be established that the Company was a "public utility" (R. 5-6, 48-55).⁶ Upon this undertaking, *inter alia*, the Commission had authorized the transaction (R. 6, 16-17, 50-54).

The Commission thereafter caused its staff to make a field investigation of the facilities and operations bearing on the status question (R. 6, 16). From the report of that investigation it appeared, according to the Commission, that the Company owned and operated "facilities in its Gila Bend, Maricopa, Coolidge-Florence, and Yuma Systems for the transmission of electric energy which is generated in the States of California and Nevada and consumed at points outside the State in which it is generated, including facilities which are in addition to, and do not include * * * facilities used in local

⁵ The references in the text are to the Transcript of Record as printed. The cross references to Exhibits in the Complaint (R. 3-77) and Affidavit (R. 86-87), are to folio numbers of the Complaint, which were omitted from the printed Transcript of Record. The pages of the printed Transcript of Record at which the respective lettered Exhibits to the Complaint appear are shown in the Index, pp. i-ii, of the printed Transcript of Record.

⁶ Arizona Edison proposed to pay almost \$500,000 more for the facilities than the seller had invested in them on its books. This raised a question as to the effect on rate payers' interests of the acquisition at such a price, unless conditioned to prevent the transaction from increasing the rate base upon which rates would be expected to provide a fair return. *Cf., Pennsylvania Electric Co. v. F. P. C.*, 188 F. 2d 763 (C. A. 3), *rehearing denied* May 28, 1951.

distribution, or only for the transmission of electric energy in intrastate commerce" and that the Company might "therefore, be a public utility within the meaning of that term as used in the Federal Power Act" (R. 43-44).

The Commission thereupon initiated a formal proceeding to determine the Company's status, to determine its resulting liability to comply with regulations applicable to every such "public utility," and to ascertain the accounting treatment it should accord its expenditures for the California Electric Power Company's facilities (R. 4, 6, 16). The order initiating the proceeding⁷ not only recited the foregoing facts, tentatively framed the issues, and provided that the Company should file a response, but also directed service of a copy of the staff report on the Company (R. 42-45).⁸ The order and copy of the report were mailed to, and actually received by, the Company (R. 6-7, 10-11, 17, 67, 68).

The Company advised the Commission that it would neither respond nor appear (R. 7, 17, 57). Nevertheless, it was given actual notice of each of the subsequent steps in the proceeding. First the Commission orders fixing time and place of hearing were mailed to, and actually received by, the Company (R. 7, 10-11, 58, 60). After the hearing, which the Company did not attend (R. 7, 15, 18), the Presiding Examiner's decision was mailed to, and actually received by, the Company (R. 8, 10-11, 73-75). Exceptions thereto by counsel for the Commission's staff were served on counsel for the

⁷ The order was headed: "Order to Show Cause," conformably to the applicable provision of the Commission's rules (18 C. F. R. § 1.6 (d)): "*Orders to show cause:* Whenever the Commission desires to institute a proceeding against any person under statutory or other authority, the Commission may commence such action by an order to show cause setting forth the grounds for such action. Said order will contain a statement of the particulars and matters concerning which the Commission is inquiring, which shall be deemed to be tentative and for the purpose of framing issues for consideration and decision by the Commission in the proceeding, and the order will require that the respondent named respond orally, or in writing (as provided in § 1.9 (c)) [18 C. F. R. § 1.9 (c)], or both."

⁸ The show cause order in this proceeding followed the pattern of those in other proceedings in which the Commission's orders have been sustained. The citations below permit comparison of the orders (*infra*, p. 16, note 18; p. 17, notes 24, 26, 27).

Company as they would have been if he had appeared and participated (R. 8, 10-11, 15; see 18 C. F. R. § 1.31).

The Commission Order

On March 31, 1950, the Commission issued its order (R. 31-41) incorporating Opinion No. 190 and including formal findings (R. 8, 14-41).⁹ This, also, was mailed to, and actually received by, the Company (R. 10-11, 76-77).

In the opinion part of its order the Commission describes (R. 19-23) the specific facilities by which electric energy is transmitted from Nevada and California into Arizona, delivered to Arizona Edison, and transmitted thence by that Company for varying distances to substations from which it locally distributes the energy to retail customers in Arizona. In particular the opinion describes how, in the operation of the various interconnected public and privately owned electric utilities in Arizona and nearby parts of California and Nevada, with their respective hydroelectric and steam or diesel generating stations, under varying river flow and utility load conditions, varying amounts of the electric energy generated at Hoover Dam in Nevada are transmitted to Parker Dam in California, and varying amounts of energy generated at one or both dams are transmitted thence from California into Arizona and in part delivered to Arizona Edison at two substations owned and operated by the Indian Service in Arizona: (1) the Casa Grande substation and (2) the Coolidge substation. The opinion also describes how varying amounts of the energy generated at the Siphon Drop station in California, as well as at Hoover and Parker Dams, are transmitted from California into Arizona and delivered in part to Arizona Edison at two delivery points in Arizona: (1) Arizona Edison Company's Mesa substation, and (2) Reclamation Bureau Headquarters substation in Yuma.

The opinion describes the lines and substations, owned and operated by Arizona Edison, by which the electric energy so

⁹ Because of the consolidated nature of the proceeding (See *supra*, p. 1, note 2) the Order also relates to Central Arizona Light and Power Company, but the portions relating to the present Appellee are readily recognizable.

delivered to it is transmitted from the foregoing substation delivery points without subdivision to other substations on its systems. Those lines, according to the opinion, include a 69,000 volt line 9.6 miles long, a 12,000 volt line, 11.5 miles long, a 34,500 volt line 12 miles long extending to a substation in one city, thence 7 miles farther to a substation in an unincorporated small community. The opinion refers to the fact that no customers are served off these lines, which are used exclusively to transmit energy in bulk at relatively high voltages to substations from which radiate customer-serving lines of relatively low voltage (usually 4,000 volts). In some instances, the opinion indicates, such customer-serving lines are undercarried back on the same pole lines carrying the higher voltage line supplying the substation, or forward on the pole lines carrying the continuation of that line to another similar substation beyond.

Citing *F. P. C. v. East Ohio Gas Co.* (338 U. S. 464) and *Jersey Central P. & L. Co. v. F. P. C.* (319 U. S. 61), the Commission first finds that the foregoing facilities, among others, are "facilities for the transmission of electric energy in interstate commerce"; then that those facilities are not "used in local distribution or only for the transmission of electric energy in intrastate commerce," and are not otherwise within any of the classes of facilities excepted from Commission jurisdiction by the so-called "'but' clause" of Section 201 (b) of the Act.¹⁰ R. 26-27.

The Commission also points out that ownership by the Federal Government of generating and transmission facilities prior to the points of delivery to Arizona Edison is of no consequence under the Act's special definition (Section 201 (b)) of transmission in interstate commerce in purely physical terms, i. e., as including transmission of energy transmitted from a State and consumed at a point outside thereof (R. 28).

The Commission accordingly concludes that Arizona Edison is a "public utility" and its formal findings numbered (1), and (3)-(14) (R. 31-35), embody the results of its consideration as discussed in its Opinion.

The ordering clauses direct the Company to comply with applicable requirements of the Act and the rules and regula-

¹⁰ See *supra*, p. 3, note 4.

tions thereunder; to comply with outstanding accounting requirements prescribed by the Commission for public utilities generally, and, with respect to the question reserved by the stipulation in the merger proceeding, to charge to Earned Surplus a prescribed part (not less than \$487,872.52) of the price paid for the facilities purchased from California Electric Power Company (R. 9-10, 40-41).

The Company's Failure to Seek Rehearing or Court Review

The Company did not make the application for Commission rehearing which is prerequisite to court review (Section 313 (a)) and did not apply to any United States Court of Appeals for review under Section 313 (b) of the Act (R. 10, par. 15). The time limits fixed by the statute for such applications had expired before the complaint was filed.

The Company's Violation of the Order

The Commission's order directed filing of certain accounting studies within 90 days (R. 40-41), and journal entries showing that the \$487,872.52 charge had been made to Earned Surplus, within 30 days (R. 41, par. (D)). The Company failed and refused to comply, and continues to do so, despite repeated requests for compliance (R. 12, 62-66).

Venue was laid in the United States District Court, District of Arizona, under Section 317 of the Act, the Company being an inhabitant of the State and District of Arizona (R. 4, par. 4).

SPECIFICATION OF ERRORS

Because the District Court did not render an opinion or offer any explanation of its actions, it is possible only to specify errors in terms of the Court's actions. The District Court erred:

- (1) In granting the Company's motion to dismiss (R. 87).
- (2) In denying the Commission's motion for summary judgment (R. 87).
- (3) In rendering judgment that the complaint and proceeding be dismissed with prejudice (R. 89).

SUMMARY OF ARGUMENT

I

A. The Commission's authority to issue this kind of order, determining whether a particular electric utility is a "public utility" and, if it is, requiring it to comply with outstanding Commission regulations, is clear from the provisions of the Act. Provisions authorizing the Commission to ascertain violations of the Act and "issue * * * orders * * * necessary or appropriate to carry out the provisions" of the Act are ample to confer such authority where "public utility" status is the key issue in establishing whether there is violation. Sections 307-309; *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186, 210, note 47. So, too, the provisions regulating transfers of electric utility facilities, and accounting by "public utilities" (Sections 203, 301), fully authorize an order like the one here sought to be enforced. For the cases are clear that such a grant of power includes power to determine the coverage of the regulation. *Macauley v. Waterman S. S. Corp.*, 327 U. S. 540, 544; *Sunshine Anthracite Coal Co. v. National B. Coal Comm'n*, 105 F. 2d 559, 562-563 (C. A. 8); *Pownall v. United States*, 159 F. 2d 73 (C. A. 9), *affirmed*, 334 U. S. 742; *Piuma v. United States*, 126 F. 2d 601 (C. A. 9).

B. Numerous decisions consistently upholding the Commission's power to issue this exact kind of order make the sufficiency of that power indisputably clear. *F. P. C. v. East Ohio Gas Co.*, 338 U. S. 464; *Jersey Central P. & L. Co. v. F. P. C.*, 319 U. S. 61; *Hartford Electric Co. v. F. P. C.*, 131 F. 2d 953 (C. A. 2), *certiorari denied* 319 U. S. 741; *Pennsylvania W. & P. Co. v. F. P. C.*, 123 F. 2d 155 (C. A. D. C.), *certiorari denied* 315 U. S. 806; *Connecticut L. & P. Co. v. F. P. C.*, 324 U. S. 515; *Border Pipe Line Co. v. F. P. C.*, 171 F. 2d 149 (C. A. D. C.); *Arkansas P. & L. Co. v. F. P. C.*, 185 F. 2d 751 (C. A. D. C.), *certiorari denied*, 341 U. S. 909; *F. P. C. v. Arkansas P. & L. Co.*, 330 U. S. 802, *reversing per curiam*, 156 F. 2d 821 (C. A. D. C.) *which had reversed* 60 F.

Supp. 907 (D. C. D. C.); *Interstate Natural Gas Co. v. F. P. C.*, 331 U. S. 682; *Safe Harbor W. P. Co. v. F. P. C.*, 179 F. 2d 179 (C. A. 3), *certiorari denied*, 339 U. S. 957; *Pennsylvania W. & P. Co. v. F. P. C.* (C. A. D. C.), decided July 3, 1951.

C. The Company's claim that it could deprive the Commission of that power by staying away from the Commission's proceeding has no support in any statutory condition to the Commission's authority, and is contrary to the "primary jurisdiction" rule. In case after case that rule has been applied to prevent efforts to invoke court jurisdiction without first exhausting administrative remedies. *United States v. Sing Tuck*, 194 U. S. 161; *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139-140; *F. C. C. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 142-143; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 400; *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 210-214; *Macauley v. Waterman S. S. Corp.*, 327 U. S. 540, 543-544; and cases cited below refusing collateral judicial reexamination of questions administratively determinable subject to statutory court review. That rule is specifically applicable to the Commission. *F. P. C. v. Arkansas P. & L. Co.*, 330 U. S. 802, *reversing per curiam* 156 F. 2d 821 (C. A. D. C.) *which had reversed* 60 F. Supp. 907 (D. C. D. C.).

II

A. The Court of Appeals review of Commission orders provided by Section 313 is exclusive. *F. P. C. v. Pacific P. & L. Co.*, 307 U. S. 156, 159, *affirming* 98 F. 2d 835 (C. A. 9); *Safe Harbor W. P. Corp. v. F. P. C.*, 124 F. 2d 800 (C. A. 3), *certiorari denied*, 316 U. S. 663.

B. The numerous decisions of this and other courts are consistent in refusing collateral judicial reexamination of questions determined by an administrative agency where such questions were reviewable under an exclusive provision for review, whether they relate to the merits of the order (*Woods v. Kaye*, 175 F. 2d 886 (C. A. 9); *Miles Laboratories v. F. T. C.*, 140 F. 2d 683, 684 (C. A. D. C.), *certiorari denied*, 322 U. S. 752), con-

stitutionality (*Yakus v. United States*, 321 U. S. 414; *United States v. Ruzicka*, 329 U. S. 287; *LaVerne Coop. Citrus Assn. v. United States*, 143 F. 2d 415 (C. A. 9)), or coverage of the Act (*Lichter v. United States*, 334 U. S. 742, affirming *Pownall v. United States*, 159 F. 2d 73 (C. A. 9); *Piuma v. United States*, 126 F. 2d 601 (C. A. 9)). All of the cases known to be relied upon by the Company in this connection are cases in which there was no direct judicial review provided by statute excluding collateral review in enforcement proceedings. *Jeager v. Simrany*, 180 F. 2d 650, 653; *F. T. C. v. Claire Furnace Co.*, 274 U. S. 160; *N. L. R. B. v. Cheney Lbr. Co.*, 327 U. S. 385; *F. P. C. v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 172 F. 2d 57; *East Ohio Gas Co. v. F. P. C.*, 115 F. 2d 385 (C. A. 6); *F. P. C. v. Metropolitan Edison Co.*, 304 U. S. 375; *United Gas Pipe Line Co. v. F. P. C.*, 181 F. 2d 796 (C. A. D. C.).

ARGUMENT

I

THE COMMISSION'S ORDER WAS WITHIN ITS AUTHORITY

A. The Terms of the Statute Plainly Authorize Such an Order

In providing a comprehensive scheme of regulation for the part¹¹ of the privately owned electric utility industry which it found needed federal regulation, Congress left a difficult task of determining whether particular electric utilities are, or are not, subject to that regulation. For Congress adopted a limited, special meaning for the term "public utility," and framed almost all of the Act's regulations (other than those for the licensing of hydroelectric projects) to pertain solely to such "public utilities."¹² As originally drafted, the bill which

¹¹ That Congress was regulating only part of the industry is expressly stated in the declaration of policy in Section 201 (a).

¹² Thus, except in emergencies, only a "public utility" may be compelled by the Commission to interconnect, or sell or exchange energy, under Section 202 (b); only a "public utility" need secure Commission approval of its disposition or merger of facilities, or acquisition of securities under Section 203 (a), and only as to acquisition of the securities of another "public utility"; only "public utilities" need secure Commission approval of security issues under Section 204; the specified rates of "public utilities," only, are regulated and required to be filed under Sections 205 and 206; and service of

later became the Federal Power Act would have regulated every electric utility whose facilities crossed, or interconnected with facilities crossing, state boundaries,¹³ but the definition of "public utility" finally adopted (*supra*, p. 3, n. 4) was more technical. It required, *inter alia*, in the case of an electric utility like Arizona Edison, determination of whether the energy transmitted on its facilities is actually in course of interstate movement, irrespective of intervening changes in custody or title, and irrespective of whether the company has control of the course of the energy beyond its facilities. *Jersey Central P. & L. Co. v. F. P. C.*, 319 U. S. 61, 68-73.

Determination of that question by the Commission was authorized where necessary or appropriate to the enforcement or administration of the Act both by general provisions relating to violations and by specific regulatory provisions.

Sections 307-309 confer upon the Commission broad powers to ascertain the facts with respect to violations and threatened violations generally, and to issue orders "necessary or appropriate to carry out the provisions" of the Act, fully warranting the kind of Commission order here sought to be enforced. Thus where, without complying with Commission regulation, an electric utility which may be a "public utility" engages in transactions or operations that are subject to that regulation if it is in fact a "public utility," Sections 307-309 clearly authorize the Commission to investigate the Company's "public utility" status. For the Commission's statutory authority to investigate "to determine whether any person has violated or is about to violate any provision of this Act or any rule, regula-

"public utilities" only is regulated under Section 207; accounting regulation applies to "public utilities" under Sections 301 and 302; and regulation under Section 305 of the declaration of dividends out of capital, participation by officers and directors in benefits from issues of securities, and the holding of interlocking positions by officers and directors, is limited to officers and directors of "public utilities."

Among the significantly few exceptions are provision for Commission regulation of exportation of electric energy from the country ("no person shall transmit") under Section 202 (e); authority to compel "parties" to make temporary interconnections during national emergency under Section 202 (c); and authority to collect industry-wide information as a basis for recommending legislation, under Section 311.

¹³ S. 1725, 74th Cong., 1st Sess.; see *Jersey Central P. & L. Co. v. F. P. C.*, 319 U. S. 61, 72, note 11.

tion, or order thereunder" (Section 307 (a)) plainly includes authority to investigate the company's "public utility" status, when that is the key question in determining whether a violation is involved.

As the Supreme Court said in *Oklahoma Press Pub. Co. v. Walling* (327 U. S. 186, 210, note 47):

* * * Of course violations could be found only in situations where coverage would exist. Authority to investigate the existence of violations accordingly included authority to investigate coverage.

Equally applicable to the determination of "public utility" status, for the same reason, are the further provisions for taking evidence, subpoenaing witnesses and records (Section 307 (b)), obtaining enforcement of subpoenas (Section 307 (c)), taking depositions (Sections 307 (d)–307 (f)), waiving constitutional immunity against being required to give incriminating testimony (Section 307 (g)), holding hearings and admitting interested persons as parties to its proceedings (Section 308 (a)), and adopting rules of practice and procedure governing investigations, hearings and proceedings, as well as the statutory provisions expressly freeing the Commission from technical rules of evidence and procedural formalities (Section 308 (b)).

Where such investigation and proceeding disclose that the company is a "public utility" and that there is a continuing or threatened violation, determination and establishment of "public utility" status and direction of obedience to outstanding regulations applicable to every "public utility," as provided in the Commission order under consideration here, are obviously within the plenary terms of Section 309:

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. * * *

Cf., Rochester Tel. Corp. v. United States, 307 U. S. 125, 127.

In addition to the foregoing general powers with respect to violations, specific regulatory provisions of the Act carry independent authority for Commission determination of the "pub-

lic utility" status question. This is illustrated by the very sections involved here which clearly authorize the issuance of this kind of order.

As the Commission's Opinion made plain (R. 15-17), its proceeding grew out of the application of California Electric Power Company for authority to sell certain of its facilities to Arizona Edison. If Arizona Edison were a "public utility" its acquisition of those facilities at the price proposed would raise an issue as to the accounting conditions which the Commission should impose.¹⁴ Therefore, whether that issue had to be decided and what, if any, action should be taken on it depended in the first place on a determination of whether Arizona Edison was a "public utility." As a result of that Company's stipulation that it would set up a \$500,000 reserve, the Commission was able to approve the sale of facilities and reserve the public utility status question and the accounting issue for further proceedings and subsequent order (*supra*, p. 4). Such reservation was authorized by the Act, for Section 203 (b) expressly provides:

* * * The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

Furthermore, because such further order would relate to accounting it would also fall within the Commission's powers under Section 301 to regulate accounting of "public utilities." ¹⁵ That Section provides:

* * * The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend

¹⁴ Compare *Pennsylvania Electric Company*, F. P. C. Opinion No. 194, issued June 1, 1950, *affirmed*, *Pennsylvania Electric Company v. F. P. C.*, 188 F. 2d 763 (C. A. 3), *rehearing denied* May 28, 1951.

¹⁵ *Pennsylvania Electric Company v. F. P. C.*, 188 F. 2d 763 (C. A. 3), *rehearing denied* May 28, 1951.

a charge or credit pending submission of satisfactory proof in support thereof.¹⁶

Inasmuch as the Commission's powers under both Sections 203 and 301 depended on the "public utility" status of Arizona Edison, those sections necessarily authorized the Commission, by the notice and hearing procedures specifically authorized in those sections, to determine that status and act accordingly. *Macauley v. Waterman S. S. Corp.*, 327 U. S. 540, 544; *Sunshine Anthracite Coal Co. v. National B. Coal Comm'n.*, 105 F. 2d 559, 562-563 (C. A. 8); *Pownall v. United States*, 159 F. 2d 73 (C. A. 9), *affirmed*, 334 U. S. 742; *Piuma v. United States*, 126 F. 2d 601 (C. A. 9).

In the *Macauley* case, the statutory grant of power to renegotiate contracts entered into with the Maritime Commission was held to authorize, by necessary implication, Board determination of the jurisdictional question of whether it had power to renegotiate contracts signed with the British Ministry of War Transport (327 U. S. at p. 544):

For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits.

In the *Sunshine Anthracite Coal Co.* case that Commission's authority to determine whether a particular coal company was a producer of bituminous coal was upheld on the basis of the inherent necessity of that determination to the discharge of the Commission's statutory function to fix coal prices on the basis of the weighted average cost "of the ascertainable tonnage" of the bituminous coal produced in each District. The Court there said (105 F. 2d 559, 563):

There is ample precedent for administrative bodies determining their own jurisdiction at the commencement

¹⁶ Commission accounting orders under Section 301 have been consistently affirmed. *Northwestern E. Co. v. F. P. C.*, 321 U. S. 119; *Pacific P. & L. Co. v. F. P. C.*, 141 F. 2d 602 (C. A. 9); *California Oregon P. Co. v. F. P. C.*, 150 F. 2d 25 (C. A. 9), *certiorari denied*, 326 U. S. 781; *Arkansas P. & L. Co. v. F. P. C.*, 185 F. 2d 751 (C. A. D. C.), *certiorari denied*, 341 U. S. 909; *Pennsylvania Electric Co. v. F. P. C.*, 188 F. 2d 763 (C. A. 3), *rehearing denied* May 28, 1951.

of the investigation of a question, subject, of course, to appropriate judicial review.

The *Pownall* and *Piuma* cases, *supra*, decided by this Court, are discussed under Point II (*infra*, pp. 24-26) in showing that such determinations by an administrative agency will not be reexamined by the courts in enforcement proceedings.

B. The Numerous Court Decisions on Review of Similar Commission Orders Confirm the Commission's Authority

The Commission's authority to issue the kind of order here sought to be enforced is confirmed by numerous Supreme Court and Courts of Appeals' decisions repeatedly affirming exactly similar orders "carrying direction of obedience to previously formulated mandatory orders addressed generally to [public utilities] amenable to the Commission's authority."¹⁷ They each followed a determination that a particular electric utility was a "public utility," or that a particular hydroelectric project was subject to the Commission's licensing jurisdiction under Section 4 (e) of the Act, or that a particular gas company was a "natural gas company" under corresponding provisions of the Natural Gas Act (which is also administered by the Commission). *F. P. C. v. East Ohio Gas Co.*, 338 U. S. 464;¹⁸ *Jersey Central P. & L. Co. v. F. P. C.*, 319 U. S. 61;¹⁹ *Hartford Electric Co. v. F. P. C.*, 131 F. 2d 953 (C. A. 2), *certiorari denied*, 319 U. S. 741;²⁰ *Pennsylvania W. & P. Co. v. F. P. C.*, 123 F. 2d 155 (C. A. D. C.), *certiorari denied* 315 U. S. 806.²¹ The Commission's orders in those cases are cited in the footnotes to permit comparison with the form of order involved here. In addition the "show cause" orders initiating the respective proceedings are referred to for the same purpose, where they are available in the F. P. C. reports. Not only were the final orders in those proceedings sustained, but even in the other cases in which similar Commission orders were

¹⁷ *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 144.

¹⁸ *Affirming* 6 F. P. C. 176, 5 F. P. C. 596; see 3 F. P. C. 917.

¹⁹ *Affirming* 2 F. P. C. 541.

²⁰ *Affirming* 2 F. P. C. 359, 2 F. P. C. 502, 37 P. U. R. (N. S.) 193, 44 P. U. R. (N. S.) 515.

²¹ *Affirming* 2 F. P. C. 61, 31 P. U. R. (N. S.) 1.

not sustained, the Commission's jurisdiction to issue the order was nevertheless recognized. *Connecticut L. & P. Co. v. F. P. C.*, 324 U. S. 515; ²² *Border Pipe Line Co. v. F. P. C.*, 171 F. 2d 149 (C. A. D. C.).²³ Furthermore, in the *Connecticut L. & P.* case, although the Commission's order was not sustained, the Supreme Court ordered a remand to the Commission for determination of the question of "public utility" status in accordance with its interpretation of the statute, thus necessarily holding that the Commission had authority to determine that question.

In addition to the foregoing cases in which the Commission acted under its general powers with respect to violations, the Commission's authority to determine "public utility" status in the discharge of a specific regulatory function has been uniformly sustained in numerous other cases. *Arkansas P. & L. Co. v. F. P. C.*, 185 F. 2d 751 (C. A. D. C.), *certiorari denied* 341 U. S. 909; ²⁴ *F. P. C. v. Arkansas P. & L. Co.*, 330 U. S. 802, *reversing* 156 F. 2d 821 (C. A. D. C.), *which had reversed* 60 F. Supp. 907 (D. C. D. C.); *Interstate Natural Gas Co. v. F. P. C.*, 331 U. S. 682; ²⁵ *Safe Harbor W. P. Co. v. F. P. C.*, 179 F. 2d 179 (C. A. 3), *certiorari denied*, 339 U. S. 957; ²⁶ *Pennsylvania W. & P. Co. v. F. P. C.*, (C. A. D. C.), decided July 3, 1951.²⁷

C. The Commission's Authority Was Not Dependent Upon the Company's Appearance or Participation in the Commission Proceeding

In the face of the clear terms of the statute and this unusually impressive body of cases upholding the Commission's authority to issue such orders as the one here sought to be enforced, it will not suffice for the Company to claim, as it did, in effect, in oral argument in the District Court, that it could deprive the Commission of such authority by its nonappearance and nonparticipation in the Commission proceeding. That contention was not that the Company had not been accorded

²² *Setting aside* 3 F. P. C. 132, 44 P. U. R. (N. S.) 170; see 2 F. P. C. 853.

²³ *Setting aside* 6 F. P. C. 411.

²⁴ *Affirming* 8 F. P. C. 106, 80 P. U. R. (N. S.) 193; see 3 F. P. C. 1018, 4 F. P. C. 728.

²⁵ *Affirming* 3 F. P. C. 416.

²⁶ *Affirming* 5 F. P. C. 221; see 4 F. P. C. 696.

²⁷ *Affirming* 8 F. P. C. 1, 170, 82 P. U. R. (N. S.) 193, 286; see 4 F. P. C. 697.

the notice and opportunity to be heard to which it is entitled under the Constitution, the Administrative Procedure Act (5 U. S. C. § 1001, *et seq.*), the Federal Power Act, or the Commission's rules. Rather the contention was phrased in terms which sought to condition the Commission's authority by importing conceptions developed in court procedures: "* * * the Plaintiff Commission lacked and now lacks *jurisdiction over the person* of Defendant, Arizona Edison Company, Inc. * * *" (R. 79, par. IV. [Emphasis supplied.])

The statute does not so condition its grants of that authority, while the "primary jurisdiction" rule also bars such a claim.

While it is true that in the cases discussed above the parties involved had, in fact, appeared and participated in the Commission proceedings, the results reached in no case depended on that fact. That they were not so dependent is shown also by the fact that those decisions were merely specific applications of the "primary jurisdiction" rule. That rule prevents resort to the courts as an alternative to administrative determination of questions committed to such agencies by Congress. The rule has to a large extent actually been developed by cases in which the parties made every effort they could, without risking sacrifice of their claims, to avoid appearing and participating in the administrative agency's proceeding. It is, therefore, peculiarly applicable to Appellee's claim.

That rule has been called the keystone of the arch of administrative regulation.²⁸ It requires that where an administrative body is given jurisdiction, its jurisdiction must be exhausted before that of the courts may be invoked.²⁹

The principle was clearly enunciated by the Supreme Court as far back as 1904, in *United States v. Sing Tuck*, 194 U. S. 161, a *habeas corpus* proceeding involving the power of an immigration inspector to determine whether certain persons were aliens and therefore not entitled to entry into the United States. The Court through Mr. Justice Holmes there said (194 U. S. at pages 167-168):

²⁸ Note, 51 Harv. L. R. 1251 (1938).

²⁹ See Berger, Exhaustion of Administrative Remedies, 48 Yale L. J. 981, 992, *et seq.* (1939).

[The act] points out a mode of procedure which must be followed before there can be resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists. An appeal is provided by the statute. The first mode of attacking his decision is by taking that appeal. * * *

We perfectly appreciate, while we neither countenance nor discountenance, the argument drawn from the alleged want of jurisdiction. But while the consequence of that argument if sound is that both executive officers and Secretary of Commerce and Labor are acting without authority, it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way.

The Court then sums up the principle of primary jurisdiction in the administrative body by saying (194 U. S. at page 170), “* * * before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with.”

That doctrine time and again has been reaffirmed by the Supreme Court in such landmark cases as *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.* (204 U. S. 426); *Myers v. Bethlehem Corp.* (303 U. S. 41); *Rochester Tel. Corp. v. United States* (307 U. S. 125, 139–140); *F. C. C. v. Pottsville Broadcasting Co.* (309 U. S. 134, 142–143); *Sunshine Coal Co. v. Adkins* (310 U. S. 381, 400); *Oklahoma Press Pub. Co. v. Walling* (327 U. S. 186, 210–214); and *Macauley v. Waterman S. S. Corp.* (327 U. S. 540, 543–544).

In the *Myers* case, *supra*, to mention but one of these oft-cited cases, contentions were advanced similar to those urged by the Company in the Court below. In that case the shipbuilding company sought to enjoin the initiation of a proceeding against it by the National Labor Relations Board alleging that it was not engaged in interstate or foreign commerce within the meaning of the act administered by the Board and that the Board did not have jurisdiction over the subject matter. The Supreme Court reversed the decrees for preliminary injunction

granted by the District Court and Court of Appeals, saying (303 U. S. at p. 50):

The Corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board. *So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance.* [Emphasis supplied.]

That the "primary jurisdiction" rule applies specifically to the Federal Power Commission's authority to determine whether an electric utility is subject to its regulation or to that of a State commission, as the company here argued in its motion to dismiss (R. 79), has been settled by the Supreme Court. *F. P. C. v. Arkansas P. & L. Co.*, 330 U. S. 802, *reversing per curiam* 156 F. 2d 821 (C. A. D. C.), *which had reversed* 60 F. Supp. 907 (D. C. D. C.). There, in an opinion announced with emphatic promptitude on the fifth day after oral argument, the unanimous Court tersely rested its decision in favor of the Commission on the "ground that respondent has failed to exhaust its administrative remedies," citing *Myers v. Bethlehem Corp.*, *supra*, and *Macauley v. Waterman S. S. Corp.*, *supra*.³⁰

One other case holding that the primary jurisdiction of an administrative agency to determine the coverage of its Act cannot be defeated by the party's desire to avoid appearing and participating in the administrative proceeding on that question, may be mentioned before we turn to consider under the

³⁰ The Supreme Court has become increasingly peremptory in its rejection of efforts to create exceptions to the "primary jurisdiction" rule. Thus in *S. E. C. v. Otis & Co.* (338 U. S. 843) the Supreme Court reversed a decision of the Court of Appeals for the District of Columbia undertaking to decide a question which was pending before the S. E. C. (176 F. 2d 34) by *per curiam* decision on the petition for certiorari, without waiting for briefs on the merits and oral argument.

next point the cases which could also be cited here, refusing to reexamine coverage questions in enforcement proceedings. In *Sunshine Coal Co. v. Adkins* (310 U. S. 381, 383), the coal company argued that if the Bituminous Coal Act of 1937 were construed as delegating power to the coal commission to determine the coverage of the Act, it would be invalid as an unconstitutional delegation of the judicial function of construction of the Act. The Supreme Court disposed of that contention, saying (310 U. S. at p. 400):

Nor is there an invalid delegation of judicial power. To hold that there was would be to turn back the clock on at least a half century of administrative law. The question of whether or not appellant should be subjected to the regulatory provisions of the Bituminous Coal Act was one which the Congress could decide in the exercise of its powers under the commerce clause. In lieu of making that decision itself, it could bring to its aid the services of an administrative agency. And it could delegate to that agency the determination of the question of fact whether a particular coal producer fell within the Act.

II

THE COMMISSION'S ORDER MAY NOT BE REEXAMINED IN A DISTRICT COURT PROCEEDING FOR ITS ENFORCEMENT

The terms of the statute and the court decisions are both clear that the Commission's order may not be reexamined in a district court proceeding for its enforcement.

A. The Statutory Provision for Court of Appeals Review Is Exclusive

Section 313 of the Act provides for review of Commission orders by Courts of Appeals. That provision has been held to formulate the conditions under which lower courts may be resorted to, to exclude review by district courts, and even to repeal by implication the earlier provision of Section 20 for district court review in the manner specified in the Urgent Deficiencies Act (28 U. S. C. §§ 41 (Subd. 28) 43-48). *F. P. C. v. Pacific P. & L. Co.*, 307 U. S. 156, 159, *affirming* 98 F. 2d 835

(C. A. 9); *Safe Harbor W. P. Corp. v. F. P. C.*, 124 F. 2d 800 (C. A. 3), *certiorari denied*, 316 U. S. 663.

In the *Pacific P. & L. Co.* case the Supreme Court, upholding this Court's denial of a motion to dismiss a petition for review of a Commission order, said (307 U. S. at page 159):

* * * [T]he Power Act contains a distinctive formulation of the conditions under which resort to the courts may be made and Congress determines the scope of jurisdiction of the lower Federal courts.

A similar conclusion was reached in the *Safe Harbor* case. There the Third Circuit had before it simultaneously a petition for review of a Commission order under Section 313 (b), and an appeal from a district court dismissal of an action for injunction against the same order, as specified in the Urgent Deficiencies Act, *supra*, pursuant to Section 20 of the Power Act. Section 20 was enacted in 1920 while Section 313 (b) was added in 1935 without any express repeal of Section 20. The Third Circuit held that the Court of Appeals review under Section 313 (b) was exclusive and superseded District Court review under Section 20 (124 F. 2d at p. 804):

* * * [S]ince Section 313 (b) does provide a new and specific and complete remedy fully covering the subject matter, we conclude that the review given by the section just cited is "exclusive" and that the review provisions of Section 20 must be deemed to have been repealed by implication.

The exclusiveness of the Section 313 (b) provision for Court of Appeals review is further shown, not alone by its express provision that the Court of Appeals "shall have exclusive jurisdiction to affirm, modify, or set aside" the Commission's order when the transcript of record has been filed in the Court, but by numerous restrictive conditions with which the statute limits the opportunity for review.

Thus Section 313 (b) provides in part:

No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for the failure

so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

Section 313 (a) adds a further restriction:

No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

Both sections also impose rigid time limits, 30 days for filing application for rehearing, 60 days for petition for review.

These restrictive provisions manifest a clear Congressional purpose to provide maximum opportunity for Commission consideration and reconsideration of all evidence and contentions before court review, to give to Commission decisions the maximum finality compatible with Constitutional safeguards, to require promptness in seeking judicial review, and to provide for that review by courts accustomed to exercising appellate jurisdiction—each a bar to the Company's present attempt.

B. The Court Decisions Consistently Deny Reexamination

That the questions determined in an order of this kind will not be collaterally reexamined in enforcement proceedings where there is such an exclusive statutory provision for direct ^{judicial} ~~exclusive~~ review has been made abundantly plain by court decisions involving efforts to obtain court reexamination not only of questions as to the merits of the order (*Woods v. Kaye*, 175 F. 2d 886 (C. A. 9); *Miles Laboratories v. F. T. C.*, 140 F. 2d 683, 684 (C. A. D. C.), *certiorari denied*, 322 U. S. 752), but of constitutional questions (*Yakus v. United States*, 321 U. S. 414; *United States v. Ruzicka*, 329 U. S. 287; *LaVerne Coop. Citrus Assn. v. United States*, 143 F. 2d 415 (C. A. 9)), and of questions of the administrative agency's jurisdiction—the precise question involved here (*Lichter v. United States*, 334 U. S. 742, *affirming Pownall v. United States*, 159 F. 2d 73 (C. A. 9); *Piuma v. United States*, 126 F. 2d 601 (C. A. 9), *certiorari denied*, 317 U. S. 637).

In view of the full consideration this Court has given the matter we shall confine our discussion to brief references to its decisions.

Earliest of those was the *Piuma* case. That was a proceeding for violation of a Federal Trade Commission order to cease and desist from advertising certain claims for a nostrum called "Glendage." No petition to review the order in the method provided by the statute was ever filed. The F. T. C.'s complaint in the District Court merely alleged issuance of the order, and service on the defendant, attaching copies of the F. T. C.'s "complaint" (corresponding to the F. P. C.'s "order to show cause" here) and "report" (corresponding to the F. P. C.'s "opinion" here), which were admitted to be true copies.

This Court affirmed judgment for the F. T. C., saying (126 F. 2d at p. 603) that from the F. T. C. "complaint" and "report":

[I]t appears that the Commission charged and found all facts essential to its jurisdiction. Its findings are not here open to review.

Next was the *LaVerne* case. There the United States sued to enjoin lemon growers' associations from violating an order, issued by the Secretary of Agriculture under the Agricultural Marketing Act of 1937, regulating the handling of lemons. The answers sought to raise questions as to the legality and constitutionality of the order, including the sufficiency of effect on interstate commerce, but evidence on those issues was excluded by the trial court on the ground there was an exclusive administrative remedy, including judicial review, by which those questions must be determined. This Court affirmed the District Court, saying (143 F. 2d at pp. 419, 420):

A study of relevant decisions leaves no doubt that an equity court has no jurisdiction to examine the validity of an administrative order where the administrative remedy has not been invoked or has not been completed and where the one harmed by the administrative order is the moving party in the equity action.

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The doctrines of primary jurisdiction and of administrative finality are equally persuasive where the

issue is raised by defending parties as where it is raised by moving parties.

The *Pownall* case was next to arise. That was an action by the United States to recover excess profits claimed by virtue of an order made by the Under Secretary of War under the authority of the Renegotiation Act. The contractors had not petitioned the Tax Court for a redetermination in the *de novo* proceeding which the Renegotiation Act provided, and their time for filing petition therefor had expired. In the District Court they alleged that the Renegotiation Act was unconstitutional and the order invalid because based on undisclosed data and containing no findings. This Court upheld recovery by the United States,³¹ saying (159 F. 2d at p. 74):

Appellants contend that the Under-Secretary of War and the Board [War Contracts Price Adjustment Board] have no authority under the Act to renegotiate the particular contracts here involved. They claim that since each of their subcontracts was for less than \$100,000 the provisions of the Act as amended on February 25, 1944, do not cover them. They also contend that since each contract was completed prior to that amendment, they are not within its coverage. *Assuming, without deciding, that there is merit in these contentions, we are of the opinion that the district court was without jurisdiction to consider them.* [Emphasis supplied.]

On *certiorari* the Supreme Court affirmed this Court's decision *eo nomine* *Lichter v. United States* (334 U. S. 742, 792), saying that the statutory provision for redetermination of excessive profits was not:

* * * an optional or alternative procedure. * * * Failure of the respective petitioners to exhaust that procedure has left them with no right to present here issues such as those as to coverage and the amount of profits which might have been presented there. * * * [F]or example, the contention in the *Pownall* case that petitioners' contracts which were for

³¹ See also *Sampson Motors, Inc., v. United States*, 168 F. 2d 878 (C. A. 9).

amounts under \$100,000 each were not subject to renegotiation.³²

Lastly in *Woods v. Kaye* the Court held that in a suit by the Housing Expediter to compel restitution of rent overcharges in accordance with a rent reduction and refund order (175 F. 2d at pp. 888-889):

In the enforcement procedure, little more than the validity of the statutory provisions * * * plus the fact of violation of the regulation or order may be inquired into.

This was rested on the existence of the statutory method of review (175 F. 2d at pp. 889-890):

* * * the District Court does not have jurisdiction to inquire into that which could have and should have been appealed to the Emergency Court of Appeals.

The Court quotes language of Mr. Justice Rutledge in *Bowles v. Willingham*, (321 U. S. 503, 527):

* * * Accordingly, by declining to take the plain way opened to her, more inconvenient though that may have been, and taking her misconceived remedy by another route, she has arrived where she might well have expected, at the wrong end.

We believe that this Court's repeated decisions lead to the same conclusion with respect to Arizona Edison.

The only cases cited by the Company in the Court below to oppose this clear line of authority were all cases in which the statute did not provide another, exclusive method of judicial review. Of course, in such cases, where the terms of the statute make the enforcement proceeding itself a direct method for reviewing the administrative order, or where constitutional safeguards entitle a party to judicial review because none has theretofore been afforded him, an entirely different situation is presented from that by this order, which was reviewable

³² Company counsel's only answer to the *Lichter* case on oral argument below was that there the coverage question had been rightly decided by the administrative agency; wrongly here. But, of course, that is precisely what this Court and the Supreme Court said could not be inquired into.

under Section 313 (b). A brief statement with respect to each of those cases will suffice to show why it does not affect the principle that is controlling here.

The only decision of this Court so cited by the Company (R. 81) was *Jeager v. Simrany*, 180 F. 2d 650, 653. That was a suit for declaratory judgment and injunction against the Officer In Charge of the Immigration and Naturalization Service in Tucson from conducting a proceeding to cancel a record of registry and certificate of lawful entry. Two points are to be noted. The first, and the one principally considered in this Court's opinion, is "that there is a complete absence of power in the Commissioner to make the cancellations" (180 F. 2d 650, 651). That case was, therefore, not one where the administrative agency was authorized to determine whether a particular person came within the coverage of the Act, and had acted within that power, as is shown to be the case here by the numerous cases already cited affirming the Commission's power to issue such orders (*supra*, pp. 16-17). The administrative agency there completely lacked any power whatever with respect to cancellation of records of registry and certificates of lawful entry.

But it is perhaps even more important to observe that the statute there involved, the Nationality Act of 1940 (8 U. S. C. §§ 501-1006), contains no provision for judicial review. Hence only by some proceeding like that there under appeal, could judicial examination of the legal question involved be obtained.

F. T. C. v. Claire Furnace Co. (274 U. S. 160) was referred to by the Company in its memorandum in opposition to the Commission's motion for summary judgment (not part of the Record on Appeal). In that case the Supreme Court, although refusing injunction against the F. T. C., declared that enforcement of the F. T. C.'s order requiring coal, steel and other companies to file voluminous monthly reports on their businesses, could only be by proceedings instituted by the Attorney General for mandamus and that in such proceedings the defendants would be able to "answer and have full opportunity to contest the legality of any prejudicial proceedings against

them. That right being adequate, they were not in a position to ask relief by injunction."

But the Court's declaration that the validity of the administrative order could be reexamined in the proceedings instituted by the Attorney General needs to be read in the light of the fact that the particular kind of F. T. C. order there involved was not otherwise reviewable at all because there was no statutory provision for court review prior to such enforcement proceeding. As the opinion makes clear that order was issued under Sections 6 and 9 of the Federal Trade Commission Act (15 U. S. C. §§ 46, 49) and enforceable solely under Sections 9 and 10 (15 U. S. C. §§ 49, 50), whereas the usual F. T. C. cease and desist orders are issued and judicially reviewable on petition of an aggrieved party (as F. P. C. orders are) under Sections 2, 3, 7, 8 and 11 of the Clayton Act (15 U. S. C. §§ 13, 14, 18, 19, 21) and Section 5 of the Trade Commission Act (15 U. S. C. § 45). Reviewability in enforcement proceedings of such an order, otherwise not reviewable, is an entirely different matter from the present situation, covered by the cases previously discussed, where Congress has provided another and exclusive mode of court review.

Another Supreme Court case relied upon by the Company in oral argument in the District Court is *N. L. R. B. v. Cheney Lbr. Co.* (327 U. S. 385). In that proceeding, initiated in a Court of Appeals to enforce an N. L. R. B. order to cease and desist from unfair labor practices, the Supreme Court said (327 U. S. 388):

Since the court is ordering entry of a decree, it need not render such a decree if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce.

This dictum is similar to this Court's language, discussed above, in *Jeager v. Simrany* (*supra*, p. 27) and immaterial here, where the Commission's order is almost identically similar to numerous orders repeatedly held within its powers on court review, as we have shown (*supra*, pp. 16-17). But it is more important to bear in mind that the review provisions of the National Labor Relations Act differ in one important essential from those of the Federal Power Act. The N. L. R. A. provision

(29 U. S. C. § 160 (f)) that Board orders may be reviewed by Courts of Appeal on petition of an aggrieved party is not an exclusive method of review. For that statute also contains parallel provisions (29 U. S. C. § 160 (e)) for judicial review of Board orders on application by the Board to Courts of Appeal for enforcement. Thus while the *Cheney* case was an enforcement case, it was *by the terms of that statute* also a direct review proceeding, with explicit statutory provision for certification of the entire Board record to the Court. Such a provision is consistent only with a Congressional intention for judicial reexamination of judicially reviewable aspects of the order. *Cf.*, *N. L. R. B. v. Red Spot Electric Co.* (C. A. 9, decided June 20, 1951). There is no corresponding provision in Sections 314 (a), 314 (b) and 317 of the Power Act under which the present enforcement proceeding is brought.

The resulting necessity for distinguishing proceedings for enforcement of N. L. R. B. orders from the present proceeding may be pointed up by noting an important difference between the orders involved. N. L. R. B. orders (like F. T. C. cease and desist orders) are without certain important legal sanctions until and unless implemented by a Court of Appeals enforcement order. F. P. C. orders, on the other hand, unless stayed,³³ must be obeyed when they become effective in accordance with the Commission's rules,³⁴ at peril of criminal penalties (Section 316), forfeitures (Section 317), and civil liabilities under some orders (such as orders fixing rates) (*Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 251).

Because of these differences, reviewability of N. L. R. B. orders in enforcement proceedings could not be deemed a precedent in enforcement of F. P. C. orders without introducing into the field of utility regulation a chaos and lack of uniformity as to what "the law" is, like that which led the Supreme Court long ago to establish the primary jurisdiction rule in *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.* (204 U. S. 426, 439, 440-441).

³³ Section 313 (c) provides for Commission and Court issuance of stay orders.

³⁴ 18 C. F. R. § 1.13 (c).

Another Supreme Court case relied on by the Company (R. 81) was *F. P. C. v. Panhandle Eastern Pipe Line Co.* (337 U. S. 498) and the same case in the Court of Appeals for the Third Circuit (172 F. 2d 57). That was a suit by the Commission to enjoin a disposition of gas leasehold interests by a "natural gas company," and to maintain the *status quo*, pending the outcome of a Commission proceeding to determine whether such disposition would impair the ability of the "natural gas company" to serve the customers in its service area. The Commission had instituted an investigation, set a date for hearing, and issued a "show cause order," as specified in its rules.³⁵ In that order, however, it directed, *inter alia*, that the *status quo* be maintained. The suit was instituted in a District Court on the apparent refusal of Panhandle Eastern to comply. 337 U. S. 498, 501. The Supreme Court, holding that the transfer of the leasehold interests was part of "production and gathering" which the statute expressly excepts from the Commission's jurisdiction, upheld denial of the injunction.

But in citing that case the Company overlooked the fact that the Commission's order there, issued before hearing, in an attempt to delay what the Commission had not then determined was within its authority to prevent, was not the kind of order which is reviewable under Section 313 (b). For, as the Supreme Court said in *F. P. C. v. Metropolitan Edison Co.* (304 U. S. 375, 383-384), neither the language of that Section:

nor that of § 313 (a), should be construed as authorizing a review of every order that the Commission may make, albeit of a merely procedural character. Such a construction, affording opportunity for constant delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions, would do violence to the manifest purpose of the provision.

* * * The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

³⁵ See note 7, *infra*, p. 5.

The show cause order which the Commission sought to have enforced in the *Panhandle* case, not being reviewable until the proceedings should result at a later date in a reviewable order, confronted the Court with a far different problem than that presented here, where there already has been full opportunity for judicial review under Section 313 (b).

The same is true of *East Ohio Gas Co. v. F. P. C.* (115 F. 2d 385 (C. A. 6)) and *F. P. C. v. Metropolitan Edison Co.* (304 U. S. 375), also cited by the Company (R. 81), both of which involved procedural orders,³⁶ not reviewable under § 313 (b).

United States v. Idaho (298 U. S. 105), relied upon by the Company in oral argument below, was a proceeding against a railroad to enjoin an "unauthorized abandonment," brought under Section 1 (20) of the Interstate Commerce Act, and against the I. C. C. to annul its order, under the Urgent Deficiencies Act which is the direct and exclusive method of review provided by the Interstate Commerce Act. But here, Arizona Edison Co. elected not to follow the direct and exclusive method of review provided by Section 313 (b). Questions of coverage reexaminable on direct review, as that case holds, may not be collaterally reexamined in enforcement proceedings, as the later Supreme Court cases we have already discussed make plain.³⁷

United Gas Pipe Line Co. v. F. P. C. (181 F. 2d 796 (C. A. D. C.)), the only remaining case cited in this connection by the Company below (R. 81), involved a general rule or regulation governing the filing of rate schedules, which the Court there held, on a petition for review, was not reviewable under Section 19 (b) of the Natural Gas Act (a review provision exactly corresponding to Section 313 (b) of the Federal Power Act), 181 F. 2d 796, 798 (C. A. D. C.).³⁸ Of course, the

³⁶ The *East Ohio Gas Co.* case involved a show cause order like that in this record (R. 42). The peculiar facts of the *Metropolitan Edison* case appear in the Court's opinion.

³⁷ *Hecht Co. v. Bowles* (321 U. S. 321), also relied on by the Company in oral argument below, may be noted in this connection. That was a proceeding to enforce an O. P. A. price regulation. The point there decided was merely that the District Court had discretion to consider whether an injunction or some "other order," as authorized in the statute, might be more appropriate to secure compliance.

³⁸ See *Woods v. Kaye*, 175 F. 2d 886, 889 (C. A. 9).

statutory method of review, being inapplicable, could not exclude other methods of review, as it does here.

CONCLUSION

The Commission had well established authority to issue the order, the Company was accorded abundant opportunity to participate in the proceedings which resulted in that order and to obtain Court of Appeals review thereof on the record made before the Commission, it has "let the hour go by" (*Utlely v. St. Petersburg*, 292 U. S. 106, 110-111), it is deliberately violating requirements of that order, and it may not now, when its compliance is sought to be enforced by court process, obtain District Court reexamination of questions determined in that order. The Judgment of the District Court should be vacated, the Court orders granting the motion to dismiss and denying the motion for summary judgment should be reversed, and the cause remanded to the District Court with instructions to grant the relief prayed.

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AUGUST 1951.

No. 12941

In the United States Court of Appeals
for the Ninth Circuit

FEDERAL POWER COMMISSION, APPELLANT

v.

ARIZONA EDISON COMPANY, INC., APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA

BRIEF FOR APPELLEE

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In the United States Court of Appeals for the Ninth Circuit

No. 12941

FEDERAL POWER COMMISSION, APPELLANT

v.

ARIZONA EDISON COMPANY, INC., APPELLEE

BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

The Commission brief herein is artfully adroit and carries a veneer of plausibility developed by the device of numerous assumptions of fact and of law.

In effect, the basis and oft-repeated assumption underlying the first division of counsel's argument (Comm. 11-21)¹ is that the Commission, having whatever jurisdiction it deems necessary "under statutory or other authority" (Comm. 5), its order, even though invalid and void when issued because outside the orbit of its authority under the Federal Power Act, nevertheless thereafter may become valid, authoritative and immune from attack. Such is the result claimed in this case because Arizona Edison (sometimes herein referred to as the "Company") elected to meet the issue of invalidity of the Commission Opinion-Order of March 31, 1950, at such time as the Commission should seek judicial enforcement thereof.

¹ References to the Commission Brief herein will be identified by the abbreviation "Comm."

The assertion that Arizona Edison claims that it "could deprive the Commission of . . . authority by its nonappearance and nonparticipation in the Commission proceeding" (Comm. 10, 17), is clearly an invention of Commission counsel. The Company made and makes no such claim. Actually, the Commission argument is that it acquired personal jurisdiction over Arizona Edison by mailing a copy of its "show cause" order to the Company, despite the denial of such jurisdiction to the Commission by Congress in the Federal Power Act.² The refusal of Arizona Edison to respond or appear before the Commission could not affect whatever lawful authority, if any, the Commission possessed. But the fact that the Company neither responded nor appeared created one of the problems now bothering the Commission.

As the result, the Commission finds it necessary to erase the jurisdiction of the District Court as *the court* of enforcement under Section 317 of the Act, a point which will be examined with some particularity later herein. The contention is that the District Court in *all* enforcement proceedings is merely an automatic mechanical rubber stamp, in effect not a court at all, just a Commission constable (Comm. 21).

The authority of the Commission being plenary, so it is said (Comm. 13), its counsel waste no time in analysis or discussion of either the statutory jurisdiction of the Commission contained in Section 201 of the Act, or the broad and "exclusive jurisdiction" conferred upon the District Courts of the United States by Section 317 of the Act.

The Commission authority to issue and serve original process is claimed to arise from various regulatory sections of the Act, other than Section 201, from its rules and regulations, and out of the "necessity" of the case (Comm. 5, 11-15). Even though

² See *Fed. Power Comm. v. Panhandle Eastern Pipe Line Co.*, 172 F (2d) 57, 61 (C. A. 3), affirmed 337 U. S. 498, wherein it is stated: "The appellant's argument points further to the Commission's order of November 10 in which it directed the Company to show cause why the transfer of the leases should not be set aside and directed maintenance of the status quo pending determination. This is an order no doubt. But if it is not a valid order because beyond Commission jurisdiction, the Commission cannot have court help to enforce it."

this is an appeal from a judgment dismissing a Commission action for enforcement (Comm. 1), counsel nevertheless devote much of their brief to "court review of orders" pursuant to Section 313(b) of the Act, a subject not herein involved (Comm. p. 21, et seq.).

A mere casual reading of Section 313(b) discloses that no general jurisdiction, exclusive or otherwise, is delegated thereby to the Court of Appeals. That Court can acquire exclusive jurisdiction in a particular case only if and after petition for review has been filed and then only "upon the filing" by the Commission in that court of "a transcript of the record upon which the order complained of was entered".

Counsel's complaint (Comm. 2, 8) that "because the District Court did not render an opinion or offer any explanation of its acts", the Commission is at a loss to define the issues herein involved, is untenable on the face of the record. The specifications of the motion to dismiss by Arizona Edison and of the motion for summary judgment by the Commission, both of which were argued at length before the District Court, the brief of the Arizona Corporation Commission *amicus curiae*, concurred in by the National Association of Railroad and Utility Commissioners, in support of Arizona Edison's motion to dismiss, as well as the extensive "Statement of Points" in this Court (R. 94-100), all make abundantly clear the questions involved here and now. Counsel's complaint evidently is a device to avoid in their "Specifications of Errors" referring to, and thereby to circumvent, the legal burden resting on the Commission "to prove that its order is valid and based upon a statutory grant of power", if it is to be entitled to judicial assistance (*Fed. Power Comm. vs. Panhandle Eastern Pipe Line Co., infra*).

There is no allegation, even by way of conclusion, in the Commission complaint (which it declined to amend, R. 88-89), that Arizona Edison was a "public utility" under the Power Act. The charge is that "it appears" to the Commission that Arizona Edison

was violating the Commission order of March 31, 1950 (R. 3) and that the Commission found Arizona Edison to be a "public utility" (R. 8-9). Accordingly, the Commission brief is impressively silent as to the "public utility" status of Arizona Edison under the Act.

Jurisdiction is the sole issue in this case. That question has three facets, to wit:

Point One: Did the Commission have authority under the Act to summon Arizona Edison to Washington by its self-appointed processes not provided in the Act?

Point Two: Did the Commission under the Act, even had Arizona Edison responded to the "show cause" order, have subject matter jurisdiction over the "facilities" of Arizona Edison, or any thereof?

Point Three: Did the District Court have jurisdiction to examine and determine the jurisdiction of the Commission, both personal and subject matter, and of the court itself, should the court find as it did that the Commission's order was invalid and void because in excess of its statutory authority?

Opposing counsel do not face any of the foregoing questions.

As to Point One, a very considerable portion of their brief is devoted to the proposition that "The Commission's order was within its authority", and that the Commission had authority to "issue the exact kind of order" as the Opinion-Order of March 31, 1950 in this case (Comm. 5, 9-10, 11-16, 16-17, 17-21). No contention is made that the particular order under review was or is valid. Counsel's discussion is largely academic and entirely immaterial in this case. But, be that as it may, the precise question here involved is the lawful authority of the Commission under the Act to summon Arizona Edison to appear before it (R. 42-45). If the Commission was without authority under the Act to issue and serve by mail, or otherwise, original process

whether designated as a rule, order, "order to show cause", or otherwise, it could not acquire personal jurisdiction over Arizona Edison unless such invalid service was waived, as it was not (R. 57-58; Comm. 5). The Commission's preliminary procedures being void, any order issued by it in reliance thereon likewise would be void on its face, a principle not discussed in the Commission brief.

Counsel's assumption is that, under various administrative and regulatory sections of the Act (Secs. 203(b), 301, 307-309; Comm. 11-15), other than the jurisdictional Section 201 thereof, and particularly under Section 309 entitled "Administrative Powers of the Commission; Rules, Regulations and Orders", from which counsel make fragmentary and partial quotes (Comm. 9, 12, 13), the Commission "necessarily" has plenary substantive powers beyond and greater than those delegated to it in the Act (Comm. 15). It is further assumed in the brief (Comm. 5), that a Commission rule (18 C.F.R. Sec. 1.6(d)) entitled "Orders to Show Cause", adopted in 1948, supplies the authority not delegated to the Commission by the Act itself.

The principle is thoroughly established by the authorities that an administrative agency cannot enlarge its statutory power by the issuance of orders and rules and regulations covering matters not in the framework of the governing statute. The purpose, and the only purpose, of rules and regulations is to implement the powers specifically and expressly delegated to the agency by Congress, not to rewrite the legislation. Nor can the agency assert the existence of an alleged congressional intent not disclosed in the language of the Act.

The precise argument herein advanced by opposing counsel, that the Commission's alleged authority under consideration stems from specific administrative and regulatory sections applicable only to a "public utility" under the Act, and from its rule making authority (Comm. 12-15), recently was advanced by the Commission before the Supreme Court with respect to the parallel

sections of the Natural Gas Act. That Court was not impressed with the argument and disposed of it decisively (*Fed. Power Comm. v. Panhandle Eastern Pipe Line Co., infra*).

The Commission here, as in the District Court, declines to discuss Point Two, that the Commission was without subject matter jurisdiction over Arizona Edison or any of its facilities, and therefore its order of March 31, 1950 was invalid and void on its face when issued. The silence of Commission counsel is more audible than words. The Commission thus places itself in the very strange and untenable position of seeking enforcement of an order, the validity of which it refuses to vouch for.

As will be made manifest later herein, it is a logical conclusion that the Commission is thus entirely unwilling to argue or discuss the validity of its order, because of absence of subject matter jurisdiction, in view of the fact that the governing jurisdictional provisions of Section 201 were so clearly and pointedly examined and applied by the Supreme Court in *Connecticut Light and Power Company v. Federal Power Commission*, 324 U. S. 515, 89 L. Ed. 1150, 65 S. C. 749, discussed hereinafter.

In counsel's treatment of Point Three, in the second subdivision of the Commission argument, entitled "The Commission's order may not be reexamined in a district court proceeding for its enforcement" (Comm. 21-32), the significant fact is the entire failure of counsel to examine the explicit and unambiguous provisions of Section 317 of the Act entitled "Jurisdiction of Offenses; Enforcement of Liabilities and Duties". This enforcement action was brought in the District Court, and it is here for review, under authority of Section 317.

The only regulatory authority which the Commission proposes to exercise over Arizona Edison relates to accounting matters. These, as well as other aspects of the Company's operations, are fully regulated under the laws of Arizona. There is no regulatory "gap" involved. The Commission simply proposes to take over certain of the duties of the state authorities.

STATEMENT OF THE CASE

In view of the evasion by the Commission of the true issues presented in this case, it becomes necessary for purposes of clarity to restate the case, correctly to disclose to this Court the judicial problems involved.

1. The Commission Procedure

The proceedings which culminated in the Commission order of March 31, 1950 were initiated by the Commission on its own motion. By "Order to Show Cause" (R. 42-45) mailed to Arizona Edison by the Secretary of the Commission (R. 71-72), the Company was ordered to submit to the then asserted jurisdiction of the Commission, unless by answer within forty-five days it could prove to the satisfaction of the Commission that it was not a "public utility" under the Power Act. The burden of proof, however, is on the Commission.³ Arizona Edison made no response to such "order", nor did it enter its appearance at any stage of the proceeding, on the stated ground (R. 57-58) that the Commission under the provisions of the Federal Power Act was without jurisdiction over it or any of its facilities.

Thereafter, the Commission ordered a hearing to be held on June 6, 1949, copy of which order was mailed to the Company. *On June 1, 1949, the Commission by order fixed Washington as the place of such hearing. This order of June 1, 1949, mailed to the Company, was received by it on June 6, 1949, after the hearing was in progress (R. 71-72).* As above pointed out, the Federal Power Act contains no provision authorizing the Commission to issue or serve by mail or otherwise original process. The Act confers no authority on the Commission to enforce its directive to appear.⁴ The "Order to Show Cause" and the purported service

³ *Federal Power Comm. v. Panhandle Eastern Pipe Line Co.*, *infra*; *National Labor Relations Board v. Goodyear Footwear Corp.*, 186 F (2d) 913, 917 (C. A. 7, 1951)

⁴ "The statute (Federal Power Act) confers no authority upon the Commission to enforce its directions to appear" *Federal Power Comm. v. Metropolitan Edison Co.*, 304 U. S. 375, 386, 58 S. C. 963, 82 L. Ed. 1408, 1415.

thereof by mail were without legal sanction, authority or effect. The only manner in which the Commission is permitted by the Act to secure enforcement of its orders, is by proceedings under Sections 314(a), 314(b) and 317 entitled respectively "Enforcement of Act, Regulations and Orders", and "Jurisdiction of Offenses; Enforcement of Liabilities and Duties."

2. Operations of Arizona Edison as Set Forth in Opinion-Order March 31, 1950.

"Arizona Edison is an Arizona corporation with its principal office in Phoenix, Arizona. It is engaged, solely in the State of Arizona, in the business of transmitting electric energy, and distributing and selling it at retail. (R. 15)

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"Arizona Edison owns and operates eight separate electric systems scattered through central and southern Arizona, among which are the Maricopa, Coolidge-Florence, and Yuma Systems. These three systems, the only ones involved in this proceeding, supply ultimate consumers alone in their separate service areas, and all receive electric energy generated by the United States Bureau of Reclamation ("Bureau") in California at the Parker Dam and in Nevada at the Hoover Dam. The Yuma System also receives energy generated by the Bureau at its Siphon Drop Generating Station in California. (R.19)

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"From Parker the Bureau transmits energy generated there in California—often mingled with energy generated at Hoover in Nevada—over its two 161 kv lines a distance of 137 miles to the Bureau's substation at Phoenix, Arizona. At Phoenix, a part of this energy is delivered to Central Arizona and to the Salt River Valley Water Users Association; the remainder of this energy is transmitted in a southeasterly direction over a 115 kv line owned by the Bureau to Coolidge, Arizona, 53 miles from Phoenix, where part is delivered to the United States Indian Irrigation Service ("Indian Service"), and to Tucson, Arizona, where part is delivered to The Tucson Gas, Electric Light and Power Company.

"Part of the energy that the Indian Service receives from the Bureau at Coolidge it transmits 23 miles in a southwesterly direction over its 69 kv line and delivers at its Casa Grande substation to Arizona Edison's Maricopa System, which is located about 40 miles south of Phoenix. Arizona Edison transmits such energy 9.6 miles west to its Sexton substation over its 69 kv line without serving any customers between Casa Grande and the Sexton substations. At this substation the energy is stepped down and converted for service to an irrigation pumping load in the area. (R.20).

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"At Coolidge, the Indian Service delivers some of the out-of-state energy received from the Bureau at 12 kv to Arizona Edison's Coolidge-Florence System. Part of this energy is transmitted by Arizona Edison from Coolidge in a northeasterly direction to Florence over its 11.5 mile, 12 kv line, which connects substations in the two towns, and serves no customers along the route.

"The Bureau delivers out-of-state energy to Arizona Edison's Yuma System, located in the extreme southwestern corner of Arizona, at Arizona Edison's Mesa substation and at the Bureau's Headquarters substation in Yuma, and so furnishes almost the entire requirements of this system. This energy is transmitted at 34.5 kv from the Bureau's Gila substation about ten miles east of Yuma and from the Bureau's Siphon Drop generating station to the north in California. Energy reaches the Gila substation on the Bureau's 116-mile, 161 kv line from Parker Dam.

"The Yuma System includes several 34.5 kv lines and their attendant substations.

"The longest of these lines commences at the Mesa substation in Yuma, passes the municipal limits, and extends in a southwesterly direction through agricultural areas about 12 line miles to a substation in the incorporated city of Somerton and thence about 7 line miles further to a substation in the unincorporated community of Gadsden , 19 miles in all without serving customers. At these substations, and at two others which are served by the line between Yuma and Somerton, the energy is stepped down 34.5 kv to 4 kv,

and lines at the lower voltage, some of which are supported on the same poles as the 34.5 kv lines for various distances, emanate from each of the substations to serve the adjacent localities including the towns of Somerton and Gadsden. The Mesa-Gadsden line, therefore, serves the function of transmitting energy in bulk from the Mesa substation in Yuma to the several substations referred to above where local distribution begins for service to the respective communities and agricultural areas.

"Another 34.5 kv line extends eastward from the Mesa substation about 13 miles, serving a substation at an airport and one customer about three miles from its terminus, and also supports on the same poles a 4 kv secondary line for about three miles. Other 34.5 kv lines are .5, 1.25, and 1.5 miles in length. These lines, the Mesa-Gadsden line, and the airport line are used to transmit out-of-state energy and serve no customers directly except the airport and one other customer on the airport line mentioned above." (R. 21-23)

It is not contended by the Commission that Arizona Edison either owns or operates or has any interest or control whatever in any part of the facilities by which the electric energy generated outside of Arizona, is delivered to its local Maricopa, Coolidge-Florence, and Yuma Systems (R. 19, 20, 21-23). The only possible claim for subject matter jurisdiction over any of the facilities of Arizona Edison is the fact that electric energy, generated outside of the State of Arizona, enters certain of the local system facilities of the Company. However, as above stated, the Commission refuses to discuss subject matter jurisdiction at all.

3. Other Relevant Matters

The Commission lays considerable emphasis (R. 5, 16, 38-39, 41-43, 48-49, 51-52, 53; Comm. 4, 14), upon the letter by General Counsel of Arizona Edison, dated March 10, 1948, to the Commission (R. 48-49), in connection with the Matter of California Electric Company, Docket No. IT-6096, then pending before the Commission upon the application of California Electric, a "public utility" under the Act, for a Commission order

authorizing the sale of certain property of that Company in Yuma County, Arizona, to Arizona Edison. It is not clear just what proposition the Commission is trying to establish thereby. In the first place, it is entirely evident that Arizona Edison could not, by letter or otherwise, create subject matter jurisdiction in the Commission or waive the non-existence of such jurisdiction in that agency. Secondly, the letter was not in the nature of a waiver of personal service to be effective at some later time, and could not be so construed. In the third place, the letter did not state that which the Commission and its counsel repeatedly have declared it stated, to-wit: (Comm. 4) "Arizona Edison had agreed to set up a special reserve assuring compliance with such conditions as the Commission might attach to the Company's acquisition of the facilities, *if it should be established that the Company was a 'public utility'*" (Emphasis added). The letter actually reads (R. 48-49): "Without prejudice to the right of the Commission, *if it so elects to have adjudicated in a lawful, separate and subsequent proceeding . . .*" The foregoing language was advisedly addressed to a judicial enforcement proceeding, the only procedure in which the Commission could elect "*to have adjudicated*" the "public utility" status, if any, of Arizona Edison. The Company simply declined to submit itself to the Commission which then, as now, had no jurisdiction over it or any of its facilities.

The District Court did not have before it the report of the field investigation by the Commission staff (Comm. 6), the Trial Examiner's intermediate decision (Comm. 7-8), or any part of the evidence, consisting of both oral testimony and exhibits, received at the "public hearing" of June 6, 1949 (Comm. 7). None of these were attached to or made a part of the Commission's complaint herein.

SUMMARY OF ARGUMENT

On the record as made and now before this Court, Arizona Edison will present its argument under the following specifications:

I. The Commission is without legal authority to issue and cause to be served original process, in the nature of a complaint and summons, however labelled, except as specifically authorized so to do by statutory authority. As applied to this case, the Commission was without jurisdiction to issue authoritative legal process ordering and commanding Arizona Edison to appear before it by answer or personal appearance, prior to the judicial determination that the Company or some part of its facilities were subject to the jurisdiction of the Commission under the Act. That such process was invalid and void appears on the face of the record.

II. The Commission is without subject matter jurisdiction to enter a valid enforceable order finding Arizona Edison to be a "public utility" as defined in the Act or to order the Company to comply with any of the regulatory provisions of that Act, applicable only to a "public utility". The mere fact that electric energy generated outside of Arizona is conveyed into Arizona and there sold and delivered by federal agencies into three of the local systems of Arizona Edison does not create Commission jurisdiction over any of the "facilities" of such local systems. The invalidity of the Opinion-Order of March 31, 1950 appears on the face thereof.

III. It is the duty of the District Court in an enforcement proceeding under Section 317 of the Act, and of this Court on review of the judgment of the District Court in such action for enforcement, to examine into and determine whether the Commission had jurisdiction to enter the order involved and, also, whether the District Court had jurisdiction to enforce such order. If the Commission order be invalid, there is no order for the District Court to enforce, for under such circumstances, the only order the Court could enter, as in this case, is one dismissing the action.

ARGUMENT

I

The Commission is Without Legal Authority to Issue and Cause to be Served Original Process in the Nature of a Complaint and Summons, However Labelled, Except as Specifically Authorized So to do By Statutory Authority.

The Federal Power Act is entirely silent as to the issuance and service of original process by the Commission, except as expressly authorized in certain sections for the purpose and upon the conditions stated in such sections.

In Section 10(f) of Part I of the Power Act (being the Federal Water Power Act as amended August 26, 1935), the Commission is authorized on the conditions stated to summon the owner of an "unlicensed project" to appear before it "after notice" for a particular stated purpose. The Commission, of course, has a continuing jurisdiction over a "licensee" who, by becoming such, has submitted himself to the jurisdiction of the Commission.

Under Section 202(a), (b) and (c) of Part II of the Act, entitled "Interconnections and Coordination of Facilities", the Commission is specially authorized for the purposes of said Section 202 and on the conditions therein stated, to "give notice" bringing before it the parties in interest.

In Section 207 of Part II of the Act, entitled "Furnishing of Adequate Service", the Commission is expressly authorized on certain stated conditions to "give notice" to the interested persons of "opportunity for hearing" and thereafter to make findings and enter the appropriate order, rule or regulation.

In Section 209 of Part II of the Act, entitled "Use of Joint Boards; Cooperation with State Commissions", the Commission is given specific enumerated powers for the purposes of such Section.

In Section 307 of Part III of the Act, entitled "Investigations by Commission; Attendance of Witnesses; Depositions", the Commission is given wide investigative powers and "for the purpose of any investigation or any other proceeding under this Act" the Commission is authorized "to subpoena witnesses, compel their attendance require the production of books and other records which the Commission deems relevant or material to the inquiry from any place in the United States at any designated place of hearing" And court aid may be invoked in cases of contumacy or refusal to obey a subpoena issued by the Commission. Similarly, any person may be required to appear and make deposition.

It will be observed that while a wide power of subpoena is delegated to the Commission in aid of its broad investigatory powers, the only delegation of authority to issue original process in the nature of summons is found in specific sections, none of which are involved in this case, and such authority is available only for the stated purposes of the particular sections. The authority to issue complaints and summons, and to cause service thereof to be made, is much more fundamental than the authority to issue and serve subpoenas. In the former, personal and property rights are involved, while in the latter situation no rights of a truthful witness are affected or jeopardized.

After investigation "whenever it shall appear" to the Commission that the Act, or any order, rule or regulation of the Commission is or will be violated, the Commission has ready access to the District Court of the United States under Section 314 of the Act, to which courts "exclusive jurisdiction" over such matters is delegated by Section 317 of the Act.

The Act is silent as to so-called "jurisdictional proceedings", which seems to be the foundation of the argument of opposing counsel that of "inherent necessity", "necessarily", the Commission not only must have "authority to investigate coverage" which, of course, is delegated to it by the Act, but also it must have

authority to issue and cause to be served original process to determine jurisdiction. It is asserted, "Determination of that question ("coverage", "jurisdiction") by the Commission was authorized when necessary or appropriate to the enforcement of the Act, both by general provisions relating to violation and by *specific regulatory provisions*" (Emphasis added) (Comm. 12).

Counsel claim to find the desired power particularly in Sections 307-309 of the Act, from which fragmentary quotations, out of context, are made in their brief (Comm. 12, 13, 14).

Section 307 relates only to "Investigations by the Commission; Attendance of Witnesses; Depositions". But investigation is one thing and judicial adjudication is quite something else. It is not charged that there was interference at any time with the Commission's investigating processes.

Section 308 relates to "Hearings; Rules of Procedure", "under this Act" and "under the authority of this Act". So far as hearings are concerned, the Commission is authorized to "admit as a party" any and all interested persons. However, nothing is stated about commanding the attendance of any person at any such hearing. Obviously, a person who has submitted to the jurisdiction of the Commission as a "public utility", and who in fact is a "public utility" within the statutory language, is thereafter subject to the continuing jurisdiction of the Commission over it or over such of its facilities as are covered by the statutory grant of power. That situation is quite different from the one here involved, wherein Arizona Edison does not admit that it is a "public utility" under the Act and there has been no judicial determination that it is such a "public utility". In the normal case, a person who is clearly subject to the jurisdiction of the Commission under the Act would waive personal service and make an appearance. There would be no reason for such person doing otherwise. But, by the same token, there is no reason why any person who is not, or has reasonable grounds to feel that he is not, a "public utility" under the Act should waive service and submit to the Commission

jurisdiction. The statute provides a method by judicial enforcement to determine such questions, which are judicial and not administrative; and, as legal questions, they are not within the peculiar technical and skilled competence of administrative agencies. *Branan v. Stark*, 185 F (2d) 871, 875 (C.A.D.C. 1950).

The argument erroneously attributed by counsel to Arizona Edison that "it will not suffice for the Company to claim as it did in effect in oral argument in the District Court that it could deprive the Commission of such authority (that is, to enter its order) by its nonappearance and nonparticipation in the Commission proceeding" (Comm. 17), simply begs the question. If the Commission has authority to issue original process and cause service thereof to be made as in this case, then whether the Company appeared and participated, or did not appear and did not participate, would not deprive the Commission of such jurisdiction. On the other hand, if the Commission is without authority to issue original process and cause service thereof to be made as in this case, then it cannot acquire such authority unless the Company waives the absence of lawful personal service, which was not done in this case.

Other sections of the Act, and particularly Section 203, entitled "Disposition of Property; Consolidations, Purchase of Securities" and Section 301, entitled "Accounts, Records and Memoranda", it is argued, give the Commission the authority attempted to be exercised in this case, because in each of such sections there are provisions for "notice" and "opportunity for hearing". In Section 203 the "notice and opportunity for hearing" is authorized only after and pursuant to application *by a "public utility"* for Commission approval, in connection only with the particular subject matter of that section. The authority of the Commission under Section 301 is limited to "licensees and public utilities" and it is these only to whom the "notice" and "opportunity for hearing" is to be directed.

Clearly, the regulatory sections of the Act cannot be resorted to *for the purpose of determining whether the company involved is a "public utility" under the Act.*

"The court below, following a statement in *Hartford Electric Light Co. v. Federal Power Commission*, 131 F. 2d 953 (C.C.A. 2d, 1942), held that this 'but' clause 'is intended to make it clear that this jurisdiction extends even to local facilities where the Act provides for their regulation, as it does in the case of accounting practices.' *This seems to get the cart before the horse, for whether the Act provides for such regulation depends on whether the facilities are under the jurisdiction of the Commission; the Commission's jurisdiction does not depend on some independent application of the regulatory provisions.*" (Emphasis added)

Connecticut L & P. Co. v. Federal Power Comm., (1945), 324 U.S. 515, 527, 65 S. C. 749, 89 L. Ed. 1150, 1159.

Unless a person such as Arizona Edison is a "public utility" under the Act, the regulatory sections in question have no application whatever to it. It was so held by the Supreme Court of the United States in *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, *infra*, wherein Mr. Justice Reed, speaking for the Court, declared with respect to certain of the parallel provisions of the Natural Gas Act:

"The Commission cites §§ 5(b), 6(a) and (b), 8 (a), 9(a), 10(a), and 14(b) to show that Congress intended 'to confer a certain measure of authority upon the Commission' over the production and gathering of gas. These sections empower the Commission to make investigations, to prescribe rules for the keeping of accounts and records by the natural gas companies, and to require that the companies file such reports as are deemed necessary by the Commission in the proper administration of the Act. These powers are inquisitorial in nature and were designed to aid the Commission in exercising its powers and 'to serve as a basis for recommending further legislation to the Congress.' Section 14(b), quoted below, comes closest to supporting the Commission's argument but that confers only power

to obtain information. Although these sections bear evidence of congressional consideration of the relationship of production properties to other elements of the natural gas business, they do not even by implication suggest to us an extension of the regulatory provisions of the Act to cover incidents connected with the production or gathering of gas.

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"The Commission urges it has jurisdiction over the transaction between Panhandle and Hugoton from the powers granted to it by § 7(c) of the Act which authorizes it to issue certificates of convenience and necessity for the interstate transportation and sale of natural gas and those granted to it by §§ 4 and 5 to determine reasonable rates for such transportation and sale. Sections 4, 5 and 7 do not concern the producing or gathering of natural gas; rather they have reference to the interstate sale and transportation of gas and are so limited by their express terms. Thus §§ 4(a), (b), (c), 5(a) and 7(c) speak of 'transportation or sale of natural gas subject to the jurisdiction of the Commission' while § 7(a) and (b) refer respectively to 'transportation facilities' and 'facilities subject to the jurisdiction of the Commission.' Nothing in the sections indicate that the power given to the Commission over natural gas companies by § 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce. The repetition of the words 'subject to the jurisdiction' makes clear to us the intent to keep the Commission's hands out of the excepted local matters. The same answer applies to petitioner's argument that § 16 gives it authority to stop sales of leases. *The power to do the things appropriate to carry out the provisions of the Act can hardly be taken to rescind a prohibition against certain actions.* (Emphasis added)

"The Federal Power Commission leans heavily upon § 7(b) which provides that no natural gas company may abandon any of its facilities subject to the jurisdiction of the Commission without prior approval of the Commission. The argument here is that since natural gas is the 'lifeblood' of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue serv-

ice; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section, like those above, covers only 'facilities subject to the jurisdiction of the Commission.'

"To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress. The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states.

". We can not attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power."

Federal Power Commission v. Panhandle Eastern Pipe Line Co.
(1949) 337 U. S. 498, 505-514, 69 S.C. 1251, 1256-1260, 93 L. Ed. 1499, 1505-1509

That the Commission may not enlarge, extend, add to, alter or amend the Power Act by its rules and regulations or other administrative orders is well settled. The power to make such rules, regulations and orders as are proper or necessary to carry out the provisions of the governing statutes is administrative only and not the foundation for the exercise of plenary powers. Legislation may not be enacted under the guise of the exercise of the rule making power. If attempted, it is a mere nullity. When the Congressional purpose is to delegate to any agency authority to issue and serve original process, such power must be, and is, granted expressly and with particularity. See, for example, National Labor Relations Act, Section 10(a) and (b), 29 U. S. C. A. Sec. 160 (a), 160(b);

Federal Trade Commission Act, 15 U.S.C.A. Sec. 45(a), 45(b). Such provisions are conspicuously absent from the Federal Power Act.

Manhattan G. E. Co. v. Commr., 297 U.S. 129, 134, 80 L. Ed. 528, 531, 56 S. C. 397

Campbell v. Galeno Chemical Co., 281 U. S. 599, 610, 74 L. Ed. 1063, 1069-70, 50 S. C. 412

Jones v. Securities and Exchange Comm., 298 U. S. 1, 56 S. C. 654, 80 L. Ed. 1015

Louisville & Nashville R. Co. v. United States, 282 U. S. 740, 758, 759; 75 L. Ed. 672, 684; 51 S. C. 297, 304

Stark v. Wickard, 321 U. S. 288, 309, 310; 88 L. Ed. 733, 747, 748; 64 S. C. 559, 571

Jaeger v. Simrany, 180 F. 2d 650, 653 (C.A. 9, 1950)

United States v. Youngstown Sheet & Tube Co., 171 F. 2d 103, 110, 111 (C.A. 6, 1948)

62 Cases, *More or Less, each containing 6 Jars of Jam, et al v. United States*, (1951) 340 U.S. 593, 71 S.C. 515, 95 L. Ed. 443.

Counsel themselves differentiate their several cases cited under the argument headings, "The numerous court decisions on review of similar Commission orders confirming the Commission's authority" (Comm. 16), and "The Commission's authority was not dependent upon the Company's appearance or participation in the Commission proceedings" (Comm. 17), by their statement (Comm. 18), "While it is true that in the cases discussed above the parties involved had in fact appeared and participated in the Commission proceedings, the results reached in no case depended upon that fact". The fact that the companies involved in the particular cases referred to waived their personal rights to require the Commission to bring an enforcement proceeding can hardly serve to establish the proposition that the Commission had authority to summon them to appear and defend themselves. The argument is backhanded and proves nothing, except that the various companies voluntarily appeared before the Commission.

Even a company admittedly and judicially determined to be a "public utility" or "natural gas company" under the applicable Act, and under actual and continuing Commission regulation, is not bound by and may ignore with impunity an order of the Commission entered in excess of its statutory authority. *Colorado Interstate Gas Co. v. Fed. Power Comm.*, 185 F (2d) 357, (C.A. 3, 1950); *Fed. Power Comm. v. Panhandle Eastern Pipe Line Co.*, 172 F (2d) 57, (C. A. 3, 1949); affirmed in 337 U. S. 498, 69 S. C. 1251, 93 L. Ed. 1499, *supra*.

Further seeking to buttress its position, the Commission argues the so-called "primary jurisdiction" rule (Comm. 18-20). However, where there is no jurisdiction whatever, it is difficult to see how the so-called "primary jurisdiction" rule can come into play.

Moreover, whatever jurisdiction, if any, the Commission had in this case, it was exhausted before the Commission came to the District Court for an order of enforcement. Arizona Edison made no attempt to interfere in any way with the Commission's administrative activities. It simply stood by for a judicial determination as to whether it is a "public utility" under the Act, should the Commission wish to invoke the aid of the District Court to determine that status. The "primary jurisdiction" rule has application only when an effort is made, through the courts, to interfere with or stop the administrative processes, whatever they may be.

"The first answer the Commission makes to the contention that regulation of this transaction is beyond the authority which the Congress granted it, is to say that it is now an established principle of administrative law that the administrative body or agency is, in the first instance, its own judge of the scope of its jurisdiction. Several Supreme Court decisions are cited to us in support of this suggested principle. *Macauley v. Waterman Steamship Corp.*, 1946, 327 U. S. 540, 66 S. Ct. 712, 90 L. Ed. 839; *Oklahoma Press Publishing Co. v. Walling*, 1946, 327 U. S. 186, 66 S. Ct. 494, 90 L. Ed. 614, 166 A.L.R. 531; *Endicott Johnson Corp v. Perkins*, 1943, 317 U. S. 501, 63 S. Ct. 339, 87 L. Ed. 424; *Myers v. Bethlehem Shipbuilding*

Corp., 1938, 303 U. S. 41, 58 S. Ct. 459, 82 L. Ed. 638. See Nathanson, Some Comments on the Administrative Procedure Act, 41 Ill. L. Rev. 368, 409 (1947); cf. Berger, Exhaustion of Administrative Remedies, 48 Yale L. J. 981, 992 (1939). This Court is not unfamiliar with the decisions cited nor the problems they present, and it quite realizes the risks of making sweeping generalizations in a developing field of the law. We think the one suggested to us is too sweeping. The instances cited were cases where courts came in between the litigant and the agency, and blocked, or refused to assist, the carrying out of duties imposed by the lawmaking body upon the agency. The Wages and Hours Administrator cannot, of course, determine whether a given operation in a particular factory is subject to the statute until he finds out what the operation is and then finds out if the provisions of the law are being obeyed by the factory owner. *Oklahoma Press Publishing Co. v. Walling*, 1946; 327 U. S. 186, 66 S. Ct. 494, 90 L. Ed. 614, 166 A.L.R. 531. But in this case no court is stepping between the Commission and the performance of its job. The Commission is on the other hand, seeking court help, which it admits is discretionary, in a situation where its investigatory powers have been unopposed. See 2 Vom Baur, *Federal Administrative Law* § 825 (1942). When a party plaintiff seeks court help, it must show that it is entitled to such help. In determining whether a plaintiff is entitled to the relief asked, the court cannot escape the responsibility of deciding whether plaintiff has been given rights or powers for which court sanction is now sought."

Fed. Power Comm. v. Panhandle Eastern Pipe Line Co., *supra*, at pages 59-60, of 172 F (2d).

"But another point raised by the government counsel is that the assessment, not having been appealed from, was *res judicata* and conclusive, and defendant was precluded from showing the contrary.

"It is true that the Internal Revenue Act of 1864 authorizes the Commissioner of Internal Revenue, on appeal to him made, to remit, refund and pay back all taxes erroneously or illegally assessed or collected (sec. 44), and the amended Act of July 13, 1866, declares that no suit shall be maintained for the recovery of any tax alleged to have been erroneously or illegally

assessed or collected until such appeal shall have been made, and a decision had. Sec. 19. The suit thus prohibited is a suit brought by the person taxed, to recover back a tax illegally assessed and collected. This is different from the case now under consideration, which is a suit brought by the Government for collecting the tax, and the person taxed (together with his sureties) is defendant instead of plaintiff. No statute is cited to show that he cannot, when thus sued, set up the defense that the tax was illegally assessed, although he may not have appealed to the commissioner.

"Is he precluded by any general rule of law from setting up such a defense? Has an assessment of a tax so far the force and effect of a judicial sentence that it cannot be attacked collaterally, but only by some direct proceeding, such as an appeal or certiorari, for setting it aside?

"It is undoubtedly true that the decisions of an assessor or Board of Assessors, like those of all other administrative commissioners, are of a *quasi* judicial character, and cannot be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property or operations not taxable, such assessment is illegal and cannot form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor. When the Government elects to resort to the aid of the courts it must abide by the legality of the tax."

Elmore B. Clinkenbeard, et al. v. United States, 21 Wall., 65-71, 22 L. Ed. 477.

The rule, according to opposing counsel, is that "*where an administrative body is given jurisdiction*, its jurisdiction must be exhausted before that of the courts may be invoked" (Emphasis added) (Comm. 18). Here the question is whether it was given jurisdiction by the Act.

It is not necessary to discuss any of the numerous decisions cited by Commission counsel in connection with the first division

of their argument, entitled "The Commission order was within its authority" (Comm.-Summary 9-10, Argument 11-21). Insofar as counsel discuss any of such decisions, their quotations therefrom are fragmentary and lifted from the context. They also ignore the settled rule that expressions in the opinion of a court must be considered and applied in connection with and as qualified by the facts and the law involved in the case in which such expressions were used. *Epstein v. United States*, 174 F (2d) 755, 767 (C. A. 6). Furthermore, counsel fail to enlighten this Court as to the facts, the issues or the provisions of the governing statutes involved in any of the decisions cited by them.

As a matter of fact, none of the decisions upon which they rely are pertinent in this case, for the reason, as pointed out in *Federal Power Comm. v. Panhandle Eastern Pipe Line Company*, *supra*, the general propositions, which it is said such decisions establish or support, are not in issue herein.

A. The broad assertion, not demonstrated to be the fact, that "The terms of the statute plainly authorize such an order" as the Opinion-Order of March 31, 1950 (Comm. 9, 11-16), is not responsive in any way to the question here involved whether the Commission has authority under the Federal Power Act to issue and serve, by mail or otherwise, original process wherein the cited respondent is commanded to respond and appear before the Commission. Such authority, far from being "clear from the provisions of the Act", cannot be found in the Act at all. This counsel admit, in effect, for they devote many pages to conjure up such authority by resort to Section 307 ("Investigations by Commission"), to Section 308 ("Hearings, Rules of Procedure"), and to Section 309 ("Administrative Powers of Commission; Rules, Regulations and Orders"), all of which are administrative; and to Section 203 (Dispositions of Property; Consolidations; Purchase of Securities") and Section 301 ("Accounts, Records and Memoranda") which are regulatory. None of the foregoing sec-

tions can invest the Commission with plenary authority or create powers "on the basis of inherent necessity". None of the decisions relied upon by counsel so hold.

B. Counsel's contention that "Numerous court decisions on review of similar Commission orders confirm the Commission authority" (Comm. 9, 16-17) proves nothing, for they admit that in all the decisions cited ". . . . the parties involved had, in fact, appeared and participated in the Commission proceedings" (Comm. 18). Counsel simply beg the question at issue by the citation of such irrelevant decisions.

C. The contention that "The Commission's authority was not dependent upon the Company's appearance or participation in the Commission proceedings" (Comm. 17-21), is bolstered by citations said to support the proposition that "In case after case that rule ('primary jurisdiction') has been applied to prevent efforts to invoke court jurisdiction without first exhausting administrative remedies" (Comm. 10). The so-called primary jurisdiction rule is not involved in the case at bar. Arizona Edison has not attempted at any time to invoke court jurisdiction to interfere with or stop the Commission in the discharge of its duties. On the other hand, it is the Commission which is seeking judicial assistance to enforce its order, "and thus forces the issue upon the courts". *Border Pipe Line Co. v. Federal Power Comm.*, 171 F (2d) 149 (C. A. D. C., 1948).

II

The Commission is Without Subject Matter Jurisdiction to Enter a Valid Enforceable Order Finding Arizona Edison to be a "Public Utility" as Defined in the Federal Power Act or to Order the Company to Comply with Any of the Regulatory Provisions of That Act, All of Which Are Applicable Only to a "Public Utility".

Briefly stated, the facts so far as here relevant and as appearing in the Commission Opinion-Order of March 31, 1950, are:

All property and facilities owned or operated by Arizona Edison, an Arizona corporation, are situate in central and southern Arizona; all its business operations are conducted solely in that State; all customers and consumers of electric energy served by the Company are within the boundaries of that State; all such customers and consumers are ultimate consumers; all facilities owned or operated by the Company serve only and exclusively Arizona consumers; and none of such facilities have any other possible purpose, function, use or utility. The Company owns no lines crossing the Arizona boundary and does not connect with any facilities of others at the boundary (R. 15, 19, 20, 21-23).

Arizona Edison purchases electric energy generated outside of Arizona, to-wit: in Nevada and California, by the Bureau of Reclamation, an agency of the United States Government; such electric energy is brought into central or southern Arizona over the facilities of the Bureau; such purchases of electric energy and the deliveries thereof are made into three of Arizona Edison's local systems, namely, the Maricopa, Coolidge-Florence, and Yuma Systems, by the Bureau of Reclamation or the United States Indian Service, also a federal agency, which receives electric energy from the Bureau; the Bureau sells and makes distribution in Arizona of electric energy from its said facilities to others than Arizona Edison. All deliveries to Arizona Edison are made from transformer stations of the delivering federal agencies after the voltage of the energy has been stepped down and reduced, except the energy, if any, received by the Company from the Bureau's Siphon Drop generating plant in California, which is mingled with the Bureau energy from Parker Dam before any delivery of energy is made by the Bureau to Arizona Edison's Yuma System (R. 19, 20-23).

Upon delivery of electric energy by the Bureau to Arizona Edison's three local systems, all such energy is sold and delivered

to and consumed by only ultimate consumers in the system service area of the repective and separate local systems of Arizona Edison (R. 19-23).

On the basis of the foregoing "findings", the Commission made the following "Conclusions" (R. 96-97): "Arizona Edison as an established course of business transmits electric energy in interstate commerce over the facilities" of *the three local systems above referred to*; "Arizona Edison owns and operates facilities for the transmission of electric energy in interstate commerce which is transmitted from the state in which it is generated and consumed at points outside thereof, which facilities are in addition to and do not include facilities used in local distribution or only for the transmission of electric energy in intrastate commerce"; and "Arizona Edison owns and operates facilities subject to the jurisdiction of the Commission under Part II of the Federal Power Act within the meaning of Section 201(e) of the Act and is therefore a 'public utility' within the meaning of the Act" (R. 34-35).

It is wholly immaterial what "findings" and "conclusions" of jurisdiction the Commission may make, unless the jurisdictional status essential to the exercise of any regulatory authority whatever by that body exists in fact and in law. The Commission's authority is conditioned upon and by the express congressional grant of jurisdiction, subject to the specific limitations and exceptions carved out of such grant of authority.⁵ Apparently, in its Opinion-Order herein, the Commission recognized that it must establish its jurisdiction in this case, if any, under Section 201 of the Act (R. 26-27). Yet, its complaint in this action contained no allegations, even by way of conclusion, that Arizona Edison was a "public utility" under the Act (R. 3, *et seq*). That fact and the refusal of the Commission, at any time herein, to meet the issue of subject matter jurisdiction appear consistent only with the contention that the Commission in the administration of the

⁵ *Federal Power Comm. vs. Panhandle Eastern Pipe Line Co.*, *supra*, at page 59 of 172 (2d); *Connecticut L. & P. Co. v. Fed. Power Comm.*, *infra*.

Act has plenary authority; and that even if its proceedings and orders are in excess of its statutory authority, the same are merely wrong and not invalid and void. Such appears to be the Commission's present position (Comm. 26, Note 32, 23-32), which will be covered fully in the next division of this argument.

Our present discussion will be addressed only to the proposition that unless the jurisdictional tests prescribed in Section 201 of the Act are satisfied, the Commission is without authority and any order it may make is utterly null and void, irrespective of what "conclusions" it may have indulged.

Section 201 of the Act is not complicated. The provisions thereof are stated in non-technical language of common understanding. So far as here applicable, they are:

"The provisions of this Part shall apply to the transmission of electric energy in interstate commerce"

"The Commission shall have jurisdiction over all facilities for such transmission"

"The Commission shall not have jurisdiction . . . over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce"

". . . . electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof"

". . . . 'public utility' means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part."

"No provision of this Part shall apply to, or be deemed to include the United States or any agency, authority or instrumentality" thereof.

". . . . such Federal regulation, however to extend only to those matters which are not subject to regulation by the States."

The judicial questions thus presented are: First, whether any of the local system facilities owned or operated by Arizona Edison

involved in this case are "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce", and second, whether in any event such local system facilities are "facilities for the transmission of electric energy in interstate commerce."

It is to be observed that the term "facilities" in the statutory phrase "facilities used in local distribution" is one of considerable generality.⁶ There is no differentiation, expressed or implied, in the statutory language between so-called "transmission" facilities and so-called "distribution" facilities. Yet, it will be observed that the Commission makes such distinction, *within* each of the Company's three local systems, on the basis of the distance from point of local system receipt to point of first customer delivery at the same or a further reduced voltage (R. 20-23), which it elects to describe as "transmission in bulk" (R. 26-27).⁷ Presumably, from the point of first customer delivery, the "facilities" are "used in local distribution". But the fact remains that all such lines, both prior to and after first customer delivery, however described by the Commission, actually are "facilities used in local distribution", according to the common understanding of the operations involved and the statutory phraseology. If, as declared by the Commission, they are, prior to first customer delivery, "transmission" lines, then they are excluded from Commission jurisdiction as "facilities only for the transmission of electric energy in intrastate commerce". It is to be noted that the entire phrase is unitary and constitutes a single concept, to-wit: "facilities used in local distribution or only for transmission in intrastate commerce".

The beginning of "local distribution", under the Commission theory, must mean the ultimate consumer's service line from the street or alley next to his home or place of business, for "transmis-

⁶ *Fed. Power Comm. v. Panhandle Eastern Pipe Line Co.*, at page 59 of 172 F (2d); *Connecticut L. & P. Co. v. Fed. Power Comm.*, *infra*.

⁷ See *Application of Kansas Gas & Electric Co.* (F.P.C. Opinion 34, 1938), 1 F.P.C. Rep. 536, 26 P.U.R. (NS) 259, 266, wherein the Commission concluded that there was nothing in the Act or its legislative history to indicate that Congress intended to draw any nice distinction between transmission and distribution lines.

sion" or conveyance "in bulk" continues until each individual customer is served from the common pool of electric energy. Until each of such customer deliveries is made the electric energy in the line continues to be conveyed and "in bulk". Moreover, according to the Commission, "transmission in interstate commerce" covers electric energy "conveyed across state lines whether the conveyance be by so-called transmission facilities or by distribution facilities."⁸ The further one pursues the Commission theories as to when so-called "transmission in bulk" within a local system becomes "distribution", the more apparent it becomes that the background, the history and the terms of the Act, physical laws and just ordinary sense all are ignored and cast aside.

But the Commission has had and does have ample and authoritative mandates by which to chart its course; first, the unambiguous jurisdictional tests of Section 201 of the Act, and second, the construction and application of the terms and provisions thereof by the Supreme Court, together with the Court's directions in that behalf to the Commission. The Commission, however, in this case, and in other cases as well, has refused to follow either mandate.

Accordingly, we now invite the attention of the Court to *Connecticut Light and Power Co. v. Fed. Power Comm.*, *infra*, from the opinion in which case rather extensive quotations will be made because all of the Commission arguments are disposed of therein. The opinion of the Court delivered by Mr. Justice Jackson, and concurred in by all Justices except Justices Murphy, Black and Reed, declared, *inter alia*, as follows:

"The Federal Power Commission has asserted jurisdiction to regulate the accounting practices of the Connecticut Light and Power Company.

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"The Company, incorporated by Connecticut, serving customers only in Connecticut and owning no utilities property outside of that state, is comprehensively regulated by the Con-

⁸ *Application of Kansas Gas & Electric Co.*, *supra*.

necticut Public Utilities Commission in accounting practices as in many other matters, and it challenges the jurisdiction of the Federal Power Commission.

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"The only presently existing facilities said to confer jurisdiction are at Bristol. Here the petitioning company purchases energy from the Connecticut Power Company, which despite a confusing similarity of name is an entirely separate and unaffiliated concern. *The petitioning company receives power at 66,000 volts from the lines of the Connecticut Power Company over a short tap line, owned by the Connecticut Power Company, which leads to petitioner's substation. There the energy is stepped down to 4,600 and 13,800 volts and transmitted thence over many circuits to consumers in and around Bristol.*⁹ The substation includes all of the usual equipment, lightning arrestors, disconnects, oil circuit breakers, busses, stepdown transformers, and appurtenant structures of an outdoor substation; and in the substation building a synchronous condenser is owned and operated, as required by the supply contract, to maintain the power factor.

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"It is not denied, although the Commission's findings and opinion makes no mention of the fact and appear to have given it no weight, that the predominant characteristic of the company's over-all operation is that of a local and intrastate service. It serves one hundred seven towns, cities, and boroughs of Connecticut with a total population of about 660,000 and in addition supplies substantially all the power used by local companies which serve communities of Connecticut having a population of 130,000. It owns no lines crossing the Connecticut boundary and does not connect with any other company at the boundary. *It has no business other than Connecticut service for which it needs any facilities whatever, and if local distribution service were terminated, no remaining purpose or use of*

⁹ Mr. Justice Jackson, who delivered the opinion of the Supreme Court in the *Connecticut* case, in his dissent in *Fed. Power Comm. v. East Ohio Gas Co.*, *infra*, restated precisely what the holding in the *Connecticut* case was:

"It is decidedly consistent with our recent declaration under the almost identical words of a similar Act that limitation of local facilities was not to be found in the East Ohio tax formula, and that even the transmission lines of a statewide system supplying electric power to consumers in over a hundred communities are facilities used in local distribution. *Connecticut Light & Power Co. v. Federal Power Comm.*, *supra*."

any kind is suggested for the facilities in question. Its purchases and sales, its receipts and deliveries of power, are all within the state. Its rates and its fiscal and accounting affairs are fully and so far as appears effectively regulated by the State of Connecticut.

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"The first question is whether the reviewing court acted under a misapprehension as to the meaning of the statute.

"The jurisdictional and regulatory provisions of the Federal Power Act apply only to 'public utilities', and the Act provides that by 'public utilities' it 'means any person who owns or operates facilities subject to the jurisdiction of the Commission.' § 201(e), 49 Stat. 848. These facilities are carefully defined. 'The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.' § 201(b). Transmission and sale as used in this provision are further defined to mean respectively 'transmission of electric energy in interstate commerce' and 'sale of electric energy at wholesale in interstate commerce.' And the Act goes on to say: 'electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof' and that sale of electric energy at wholesale means 'a sale of electric energy to any person for resale.' §§ 201(c), (d). Of course as preamble to all of these provisions stands the policy declaration that Federal regulation 'of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.' § 201(a).

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"The policy declaration that federal regulation is 'to extend only to those matters which are not subject to regulation by the

States' is one of great generality. It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose. But such a declaration is relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness in the specific provisions which purport to carry out its intent. It cannot be wholly ignored.

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"The assurance which the sponsors of this legislation expressed as to protection of the general jurisdiction of a state over electric utilities of this character either is not given effect by this Act at all, or it is to be found in the words of § 201 (b), 'but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used in local distribution '

"It is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.' The command 'thou shall not' is usually rendered as to forbid and we think here it was employed without subtlety or contortion and in its usual sense. If otherwise in doubt this provision should be read in harmony with the policy provision. So read its terms seem plainly to state circumstances under which the Commission shall not have jurisdiction. As such it is the provision which loomed importantly in the minds and speech of its sponsors, perhaps was necessary to get the bill passed, and is one which the Commission must observe and the courts must enforce.

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"But whatever reason or combination of reasons led Congress to put the provision in the Act, we think it meant what is said by the words 'but shall not have jurisdiction, except as specifically provided in this Part or the Part next following over facilities used in local distribution.' Congress by these terms plainly was trying to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry. To define the scope of state controls, Congress employed terms of limitation perhaps less scientific, less precise, less definite than the terms of the grant of federal power. *The expresion 'facilities used for local distribution' is*

one of relative generality. But as used in this Act it is not a meaningless generality in the light of our history and the structure of our government. We hold the phrase to be a limitation on jurisdiction and a legal standard that must be given effect in this case in addition to the technological transmission test.

"Nor do we think the exemption of 'facilities used for local distribution' exempts only those which do not carry any trace of out-of-state energy. Congress has said without qualification that the Commission shall not, unless specifically authorized elsewhere in the Act, have jurisdiction 'over facilities used in local distribution.' To construe this as meaning that, even if local, facilities come under jurisdiction of the Federal Commission because power from out of state, however trifling, comes into the system, would nullify the exemption and as a practical matter would transfer to federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control. *It does not seem important whether out-of-state energy gets into local distribution facilities. They may carry no energy except extra-state energy and still be exempt under the Act.* The test is whether they are local distribution facilities. There is no specific provision for federal jurisdiction over accounting except as to 'public utilities'. The order must stand or fall on whether this company owned facilities that were used in transmission of interstate power and which were not facilities used in local distribution.

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"Whether the Commission's decision was reached under the same misapprehension of the law of its jurisdiction is not made so clear from its findings or opinion. Of course under the Act 'The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.' § 313(b). The Commission has found that each of the facilities in question is 'used for the transmission of electric energy purchased as aforesaid from the Connecticut Power Company, as distinguished from local distribution thereof.' *It has not, however, made an explicit finding that these facilities are not used in local distribution and we are in doubt whether by application of the statute as herein construed it could have done so.* We have said, and it is applicable to this case, that 'Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear

affirmatively and not rest on inference alone.' *Yonkers v. United States*, 320 U. S. 685, 692; *Florida v. United States*, 282 U. S. 194, 211-12; cf. *Palmer v. Massachusetts*, 308 U. S. 79, 84; *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 351. Nothing except explicit findings excluding the grounds of state control gives assurance that the bounds of federal jurisdiction have been accurately understood and fully respected, and that state power has been considerably and deliberately overlapped.

"The findings and opinion of the Commission leave us in doubt, to say the least, as to whether what we consider limitations on the jurisdiction of the Commission were so considered by it. The only specific reference to the subject is the statement that 'Respondent's contentions that it is subject to regulation by the Public Utilities Commission of the State of Connecticut and therefore not subject to the regulation provided by the Federal Power Act must be rejected,' But such a rejection of state control as grounds of exemption must be preceded by the finding, giving due weight to the policy declaration in doubtful cases, that the company in question is a 'public utility' by reason of ownership of facilities not used in local distribution.

. "In determining this the Commission announced and applied a rule which appears to be one of law as to interstate transmission: 'Such transmission, in our opinion, extends from the generator, where generation is complete (citing *Utah Power & Light Co. v. Pfof*, 286 U. S. 165, 181) to the point where the function of conveyance in bulk over a distance, which is the essential characteristic of 'transmission', is completed and the process of subdividing the energy to serve ultimate consumers, which is the characteristic of 'local distribution', is begun (citing *Southern Gas Corporation v. Alabama*, 301 U. S. 148, 155, and *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 471).

". . . . In so far as the Commission found in these cases a rule of law which excluded from the business of local distribution, the process of reducing energy from high to low voltage in subdividing it to serve ultimate consumers, the Commission has misread the decisions of this Court. No such rule of law has been laid down.

"But for such an erroneous view of the law established by our decisions it seems doubtful if the Commission would have reached the conclusion that it did upon this record. Nor is it clear that if it were reached it would be supported by substantial evidence.

.....

"For the reasons stated, the judgment of the Court of Appeals is reversed with instructions to remand the cause to the Federal Power Commission for further proceedings consistent with this opinion." (Emphasis added).

Connecticut Light and Power Co. v. Fed. Power Comm. (1945), 324 U. S. 515, 89 L. Ed. 1150, 65 S. C. 749.

To one informed of no facts apart from the text of the Act, and particularly the jurisdictional provisions of Section 201 thereof, and the careful and emphatic opinion and judgment of the Supreme Court in the *Connecticut* case declaring the purpose, meaning and content of that Section, it would appear to be conclusive that Arizona Edison neither owned nor operated "facilities subject to the jurisdiction of the Commission."

But the chronology of the Commission attitude and action from and after the mandate addressed to it by the Supreme Court in the *Connecticut* case, discloses that the Commission has ignored and disregarded that mandate.¹⁰ It was in 1947, more than two years after the Connecticut decision, that the Commission finally took action on the mandate. On May 29, 1947, the Commission issued its "Findings and Order" in "Proceedings on Remand", 6 F.P.C. Rep. 104-111. The "findings", briefly stated, were: 1. "On

¹⁰ See as illustrative: In the matter of *Florida Public Utilities Company*, Opinion 189, January 25, 1950, Docket No. E-6136 (not yet published in reports), wherein the *Connecticut* case was brushed aside by a cursory but inaccurate reference to the opinion in that case; In the Matter of *Western Light and Telephone Co., Inc.*, Opinion No. 199, September 20, 1950, Docket No. E-6279 (not yet published in reports) wherein the Commission found that a "public utility" status under the Act "seems to depend on whether the source of all or a substantial part of the energy it would receive . . . is outside the State" and "it is impossible to conclude that out-of-state energy would not be supplied to Western by the proposed interconnection . . .", the system of Western and such interconnection both being wholly in Kansas. Naturally, no reference is made to the *Connecticut* case.

the basis of our review of the record in the light of the opinion of the Supreme Court, it is extremely doubtful that the necessary finding can now properly be made;" 2. "The Company is now about to remove any remaining shadow of doubt as to its status by cutting its last remaining connection with out-of-state power at its Bristol substation"; and 3. An extensive opinion construing and disagreeing with the opinion of the Supreme Court. Thereupon, since "the public interest" would not be served, the proceedings were terminated.

There is most serious doubt, also, under the decision in the *Connecticut* case, (apart from the indisputable fact that *all* "facilities" of Arizona Edison are "facilities used in local distribution or only for the transmission in intrastate commerce" over which the Commission "shall not have jurisdiction"), whether Arizona Edison owns or operates any facilities whatever "for transmission in interstate commerce". The Court will note the statement of counsel (Comm. 11-12), that "as originally drafted, the bill which later became the Federal Power Act would have regulated every electric utility whose facilities interconnected with facilities crossing state boundaries, but the definition of 'public utility' finally adopted was more technical". Yet, if the Commission is sound in its contention in this case, the same result is reached by statutory construction, despite the fact that Congress struck from the bill the proposed Commission jurisdiction arising from the interconnection of intrastate facilities with other facilities crossing state boundaries.¹¹ Such is not the law. *Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490, 508, 509; 89 L. Ed. 414, 426, 427; 65 S. C. 335.

As hereinbefore noted, Section 201 (f) of the Act provides that "*no provision of this Part shall apply to, or be deemed to include the United States or any agency thereof.*" Consequently, Section

¹¹ The relevant language of the proposed bill was: "The Commission shall have jurisdiction over all facilities for such transmission", in interstate commerce "and over all facilities connected therewith as parts of an interconnected system of power transmission situated in more than one state" H. R. 5423, 74th Cong., 1st Sess., February 6, 1935; S. 1725, 74th Cong., 1st Sess., February 6, 1935.

201(c) defining interstate commerce has no application to any federal agency, such as the Bureau of Reclamation or the Indian Service. A federal agency is not engaged in interstate commerce under the Act.

We next consider whether or not the acts of transmission and sale of energy to Arizona Edison by an agency of the United States constitute commerce at all. If these acts are not engagements in commerce by the government, it follows that the commerce commences at the point of receipt of the energy by Arizona Edison in the State of Arizona and perforce must be intrastate in character.

The Federal Constitution (Clause 3, Section 8, Article I) grants to the Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Constitution does not purport to authorize the Federal Government to engage in commerce, as such.

The point is clearly stated by Circuit Judge Sibley, presiding over a three-judge court in the Northern District of Georgia, in the case of *Georgia Power Company v. Tennessee Valley Authority*, 14 F. Supp. 673, 676, as follows:

"The great question which now presses for decision is whether TVA is so clearly without statutory or constitutional authority to do what it is about to do in Georgia as that it should be halted in its tracks. There has been some argument that interstate transmission of electricity is interstate commerce, but its local distribution is domestic commerce, but I think the matter immaterial. The federal power over interstate commerce is to regulate it, not to engage in it. TVA gets no help from that source. Its activities in selling electric power as pointed out in *Ashwander et al v. Tennessee Valley Authority*, 56 S. Ct. 466, 80 L. Ed.—, rest on the constitutional right of the United States to dispose of their property."

In a recent Opinion-Order No. 216, July 19, 1951, Docket Nos. E-1246 and E-1477, *In the Matter of Texas Illinois Natural Gas Pipeline Company*, the Federal Power Commission took occa-

sion to point out that the decision of the Supreme Court in *Federal Power Comm. v. East Ohio Gas Co.*, (1950) 338 U. S. 464, 70 S. C. 266, 94 L. Ed. 268, was an unfortunate one. Strangely enough, the Commission for years had battled strenuously and with great zeal to secure the precise decision rendered by the Supreme Court in that case. Little more than a year later, the Commission declared in its above cited Opinion-Order "It is appropriate, however, to add that we perceive no useful purpose to be served by the exercise of federal regulatory authority in a situation such as this", i.e. involving dual control, under State and Federal regulation, as to certificates of public convenience and accounting matters. "We, therefore, take this occasion to express the hope that the Congress may see fit to enact remedial legislation covering such situations where Federal regulatory jurisdiction serves no important public purpose. . . . This would create no 'regulatory gap' but would relieve the subject companies and the rate payers whom they serve, as well as this Commission, of needless administrative detail and burdensome expense."

The jurisdiction sought to be asserted herein over facilities of Arizona Edison, creating as it would dual control by the State of Arizona and the Commission, could serve "no useful purpose" and would operate merely to create "needless administrative detail and burdensome expense."

Under such circumstances, it seems incongruous that the Commission is using its own time and the time of the Courts, as well as imposing additional expense on both taxpayers and ratepayers, in the attempt in this case to establish a technical Federal regulatory authority which the Commission, under like circumstances, has admitted is not in the public interest.

III

It is the Duty of the District Court in an Enforcement Action Under Section 317 of the Act, and of This Court on Review of the Judgment of the District Court in Such Enforcement Action, to Examine Into and De-

terminate the Jurisdiction of the Commission to Enter the Order Sought to be Enforced and the Jurisdiction of the District Court to Enforce the Order in Suit.

Any intelligent appraisal and determination of the issue above stated requires prior attention to the terms of Sections 314 and 317 of the Act.

Section 314 of the Act entitled "Enforcement of Act, Rules and Regulations", provides:

" the Commission may in its discretion bring an action in the proper District Court to enjoin" violations "and to enforce compliance with the Act."

" and upon a proper showing a permanent or temporary injunction or restraining order shall be granted"

"Upon application of the Commission, the district courts shall have jurisdiction to issue writs of mandamus commanding any person to comply with the Act."

It is Section 317, entitled "Jurisdiction of Offenses; Enforcement of Liabilities and Duties" wherein the Act vests "exclusive jurisdiction of violations" in the "District Courts" and specifies the manner of the exercise of such jurisdiction. That Section provides:

"The District Courts of the United States shall have exclusive jurisdiction of violations of this Act or the rules, regulations and orders thereunder"

"The District Courts shall have exclusive jurisdiction of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of this Act or any rule, regulation or order thereunder.

"Judgments and decrees so rendered shall be subject to review as provided in the Judicial Code". (28 U.S.C. 1291).

Commission counsel in their brief under the heading "The Commission's order may not be re-examined in a District Court pro-

ceeding for its enforcement" (Comm. 21-32), completely ignore both Section 314 and Section 317. The reason is obvious. Their entire argument simply fades away in the face of the specific provisions of these two Sections.

By the terms of Sections 314 and 317 "District Courts" are vested with "exclusive jurisdiction"; their orders and decrees are to be entered only "upon a proper showing"; and the judgments and decrees so rendered "shall be subject to review"

The judicial authority thus affirmatively and expressly delegated is plenary, and attended with a broad discretion both in equity and at law. The review provided by Section 317 is of judicial judgments and decrees. If the authority of the District Courts were purely administrative, as contended by Commission counsel, there would be no reason whatever to incorporate review into the terms of Section 317. If the enforcement court were under mandate simply to enter whatever judgments and decrees of enforcement the Commission might make application for, there would be no discretion and nothing for the Court of Appeals to review. Under the Commission concept, mandamus would be the proper and sole procedure to compel enforcement should the enforcement court refuse to enforce.

"In this situation, does a registrant have the unqualified right to withdraw his registration statement or, in other words, to dismiss a pending proceeding by which, for his own advantage, he is seeking the use of the mails and the instrumentalities of interstate commerce? If he have such right, there is no basis for the exercise of discretion in respect of the matter on the part of the commission; for it is obvious that discretion does not exist where there is no power to act except in one way. Cf. *City of Detroit v. Detroit City Ry Co.* (C.C.) 55 F. 569, 573, *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93, 44 S. Ct. 446, 68 L. Ed. 912."

Jones v. Securities and Exchange Commission, 298 U. S. 1, 18, 56 S.C. 654, 659, 80 L. Ed. 1015.

Commission counsel simply dispose of Sections 314 and 317 by silence, although, as was necessary, the complaint alleged (R. 3) "This action arises under Sections 314(a), 314(b) and 317 of the Federal Power Act." This review concededly is under authority of Section 317. The Commission's whole position is self-contradicting.

It being necessary to rely on statutory authority, counsel (Comm. 19-21) resort to Section 313 of the Act, entitled "Rehearings; Court Review of Orders". It matters not, to them, that this is not a "review" but an enforcement proceeding. The ultimate argument really advanced is that (Comm. 22) the Court of Appeals "shall have exclusive jurisdiction to affirm, modify or set aside", without limitation. Anything less does not serve their purpose. But Section 313(b) does not vest any such broad jurisdiction in the Court of Appeals. If it did, then Section 313(b) and Section 317 would be in direct conflict. The Court of Appeals can acquire exclusive jurisdiction of the statutory review only if a petition for review is filed and served on the Commission, which is expressly directed to certify and file with the court a transcript of the record. Then "*upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, set aside or modify. . . .*" Unless the statutory review is undertaken by "any party . . . aggrieved" by a Commission order, the Court of Appeals is vested with no jurisdiction whatever. There is no conflict between Section 313 and Sections 314 and 317. As a matter of fact, an enforcement proceeding need not await the expiration of the time limits imposed by Section 313(a) and (b), to which counsel refer (Comm. 23). An enforcement proceeding under Section 314 may be brought *whenever* the Commission in its discretion elects so to do. See *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 59 S. C. 301, 82 L. Ed. 221.

While Congress has the constitutional authority to withhold jurisdiction, in whole or in part, from the District Court or the Court of Appeals and, under certain circumstances, to deny to a

person a judicial forum in which to have his rights adjudicated, this is not such a case. Here the controlling Federal Power Act by its express terms vests in the District Court "exclusive jurisdiction over violations and of all suits in equity and actions at law brought to enforce" There is no slightest statutory foundation for the contention that the powers of the District Court as a court of equity or as a court of law are in any manner or in any respect curtailed. Nor is judicial authority to be found which supports the Commission's contention here. On the other hand, there are numerous decisions holding to the contrary. The decisions from which "spot quotes" are made in the Commission brief do not support its contention now under consideration. Such decisions will be discussed hereinafter.

The District Court in an enforcement proceeding has the power, and it is its duty, to determine whether the Commission order is valid, for if not, there is no order to be enforced. A void order is no order for any purpose. The Court itself has no authority by its decree, to infuse validity into an invalid order. The order, to be enforceable, must have been valid when issued.

Fed Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 386-387, 82 L. Ed. 1408, 1415, 58 S. C. 963

Fed. Power Comm. v. Panhandle Eastern Pipe Line Co., 172 F (2d) 57, 60 (C.A. 3, 1949)

Fed. Power Comm. v. Panhandle Eastern Pipe Line Co., 337 U. S. 498, 515, 93 L. Ed. 1499, 1510, 69 S. C. 1251

East Ohio Gas Co. v. Fed. Power Comm., 115 F (2d) 385, 387 (C.A. 6, 1940)

United Gas Pipe Line Co. v. Fed. Power Comm., 181 F (2d) 796, 800 (C. A. D. C. 1950)

Fed. Power Comm. v. Hope Natural Gas Co., 320 U. S. 591, 64 S. C. 281; 88 L. Ed. 333

The foregoing decisions relate to the Federal Power Act and to the Natural Gas Act. The enforcement provisions, and the provisions for statutory review, in the two Acts are identical. As to each

of the Acts, the courts declare that the issue of Commission jurisdiction can be raised and adjudicated in an enforcement proceeding.

There are several decisions upholding the authority of the enforcement court to inquire into the jurisdiction of the National Labor Relations Board. The enforcement and review provisions of the National Labor Relations Act are, in substance, identical with those in the Power Act and Natural Gas Act, except that under the Labor Act the Court of Appeals is the enforcement court (Sec. 10 e), as well as the court of review (Sec. 10 f).

National Labor Relations Board v. Cheney California Lumber Co., 327 U. S. 385, 66 S. C. 553, 90 L. Ed. 739

National Labor Relations Board v. Jones & Laughlin Steel Corp., 331 U. S. 416, 67 S. C. 1274, 91 L. Ed. 1575

National Labor Relations Board v. Red Spot Electric Co., (C. A. 9, June 20, 1951, No. 12,804)

National Labor Relations Board v. Boss Mfg. Co., 107 F. (2d) 574, 578, 579 (C. A. 7, 1939)

Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 59 S. C. 301, 83 L. Ed. 221

National Labor Relations Board v. Highland Park Mfg. Co., (1951) 341 U. S., 71 S. C. 758, 95 L. Ed. 680

In *Hecht Co. v. Bowles*, 321 U. S. 321, 64 S. C. 587, 88 L. Ed. 754, the Supreme Court had before it the question of whether the enforcement provisions of the Emergency Price Control Act required the enforcement court to issue its injunction or other appropriate order as a matter of course. The contention of the Price Administrator was that Section 205 (a) of that Act was mandatory upon the enforcement court because, upon a showing by the Administrator of violation, the statutory language is that the enforcement order "*shall be granted.*" The Court rejected the contention and held "a grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended

to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."

The recent decision of this Court in *National Labor Relations Board v. Red Spot Electric Co.*, *supra*, is decisive here. In that case the company did not avail itself of the statutory review and did not appear in the enforcement proceeding before this Court. The opinions of this Court in that case are direct and specific that it, the enforcement court, is *not* "imperatively compelled to order enforcement summarily. There is no language in the enactment which points to the conclusion so desired. The whole structure of the law demands judicial consideration when an order of enforcement is prayed. If mechanical sanctions were required, these could have been provided without the necessity of appeal to the courts The postulates of jurisdiction of the Board and of the Court itself must be examined without fail." And "Upon a petition of this kind, we should carefully examine the record for the purpose of determining that the Board had jurisdiction to make its order and that it has not 'traveled outside the orbit of its authority'".

We do not deem it necessary to quote extensively from the many decisions, *supra*, which reject the contention of the Commission that the enforcement court is in effect a mere mechanical rubber stamp.

Fed. Power Comm. v. Panhandle Eastern Pipe Line Co., *supra*, was an enforcement proceeding. Judicial enforcement was denied in the District Court, in the Court of Appeals, and in the Supreme Court. The order of the Commission undertook to assert a jurisdiction which it does not possess and is prohibited from exercising, hence was invalid and void. Mr. Justice Reed, speaking for the Supreme Court, declared:

"The Commission sought by injunction to enforce its order halting the transaction between Panhandle and Hugoton pending the outcome of its investigation. The Commission argues

that at any rate the transfer should be enjoined until it can determine its own power and the necessity of using it. Injunctive aid was requested under § 20(a) of the Act and the general equity power of the district court. To be entitled to judicial assistance, however, the order issued by the Commission must be valid and based on a statutory grant of power to the Commission. As we have held above that the transfer of undeveloped gas leases is an activity related to the production and gathering of natural gas and beyond the coverage of the Act, the authority of the Commission cannot reach the sales. A proposed transfer cannot be stopped by the Commission. It should not be permitted to delay what it cannot prevent”

The same principle was restated in *National Labor Relations Board v. Highland Park Mfg. Co.*, *supra*, also an enforcement proceeding. Judicial enforcement was denied by the Court of Appeals and by the Supreme Court. Section 159(h) of the National Labor Relations Act, as amended by the Labor-Management Relations Act, 29 U.S.C.A. 159(h), provides: “No investigation shall be made by the Board, no petition under subsection (e) (1) of this section shall be entertained, and no complaint shall be issued pursuant to a charge by a labor organization unless there is on file with Board” the so-called non-Communist affidavit required by the Act to be filed. The necessary affidavit had not been filed, as required. Mr. Justice Jackson, speaking for the Supreme Court, disposed of the case, as follows:

“It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal.”

National Labor Relations Board v. Jones & Laughlin Steel Corp., *supra*, was another enforcement proceeding. It is clear from the context of the Supreme Court opinion and the opinion of the Court of Appeals (146 F (2d) 718) that the respondent company did not seek to avail itself of the statutory review. The question involved was whether the Board order had become moot. In that connection the Court, speaking through Mr. Justice Murphy, declared:

" The order was a continuing command which may be effectuated in the future. *But unless the order was valid when it was issued, there is no basis whatever for it and no court can decree its enforcement in the future.* Hence its validity must be judged as of the time when it was issued, a time when the guards were still militarized. This is not to say, however, that events subsequent to demilitarization are irrelevant in deciding whether the order should be enforced. All that we hold is that demilitarization in and of itself is not enough to render the order or the case moot." (Emphasis added).

In *Ford Motor Co. v. National Labor Relations Board*, *supra*, the Board sought enforcement of its order and thereafter the company petitioned for the statutory review. On such state of facts, Mr. Chief Justice Hughes, who delivered the opinion of the Court, declared:

"Under Section 10(f), 29 U. S. C. A. Sec. 160(f), the jurisdiction of the Circuit Court of Appeals is of the same character and scope in a proceeding for review brought by a person aggrieved by an order of the Board as the jurisdiction which the court has in a proceeding instituted by the Board for enforcement.

"While Section 10(f) assures to any aggrieved person opportunity to contest the Board's order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. *Where the Board has petitioned for enforcement under Section 10(e) and the jurisdiction of the court has attached, no separate proceeding is needed on the part of the person thus brought into the court.*

"While in the instant case there are two proceedings, separately carried on the docket, they were essentially one so far as any question as to the legality of the Board's order was concerned. Petitioner's answer in the Board's proceeding presented substantially the same objections as those raised in petitioner's proceeding for review. The present contentions of the parties are largely addressed to procedural distinctions, but if we follow the course of the two proceedings we find that there is really but one ultimate question and that is with respect to the court's final action in remanding the cause to the Board for further proceedings." (Emphasis added)

In *Fed. Power Comm. v. Metropolitan Edison Co.*, *supra*, Mr. Chief Justice Hughes, speaking for a unanimous court (two Justices not participating), used the following significant language in answer to the contention herein made that the statutory review under Section 313 of the Federal Power Act is exclusive:

"There was no order of the Commission before the Circuit Court of Appeals for review. *Apart from the question whether the order of January 6, 1936, or that of January 26, 1937, can be regarded as reviewable, no application for such a review had been made.*

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". The statute confers no authority upon the Commission to enforce its directions to appear, testify or produce books and papers save by application to a Federal court under § 307(c) Upon such an application by the Commission for the enforcement of its order, respondents would have full opportunity to contest its validity." (Emphasis added).

It thus appears conclusively that the Commission contention, "The Commission's order may not be reexamined in a District Court proceeding for its enforcement" (Comm. 21) is without support in the provisions of the Federal Power Act and identical provisions of other enactments, such as the Natural Gas Act and the National Labor Relations Act. Moreover, the decisions of the Supreme Court apply the unambiguous terms of said laws as enacted, not as Commission counsel propose. The attempt of coun-

sel (Comm. 27-29) to distinguish, particularly the provisions of the National Labor Relations Act but not those of the Natural Gas Act, from the identical enforcement and review procedures of the Power Act, is not responsive to the respective statutory provisions as written by Congress.

We now turn to the decisions (Comm. 10-11, 21-31) said to support the Commission contentions that the District Court proceeding is merely a mechanical operation.

Fed Power Comm. v. Pacific P. & L. Co., 307 U. S. 156, 159 (Comm. 22), involved the question whether a Commission order denying the application of Pacific for Commission approval of a proposed transfer to Pacific of certain property including licenses under Part I of the Federal Power Act, was reviewable, because a negative order. The Supreme Court, affirming the decision of this Court (98 F (2d) 835), held the order of denial was reviewable under Section 313(b) of the Act. No question of enforcement was or could have been involved.

In *Safe Harbor Water Power Corp. v. Fed. Power Comm.*, 124 F (2d) 800, 804 (C. A. 3) (Comm. 22), conflict was found to exist between the statutory review under Section 20 of Part I of the Act and the newer review provisions of Section 313(b) of Part III of the Act, and the issue in the case was which section of the statute should prevail. The court held that Section 313(b) prevailed and that, to the extent of the conflict, Section 20 was repealed by implication. The conflict was between two separate and independent sections relating to review. Here again, the enforcement provisions of the Act were not under consideration.

Piuma v. United States, 128 F (2d) 601 (C.A. 9), does not hold that which counsel (Comm. 24) imply from their fragmentary quotation from the opinion. The issue sought to be made by Piuma was "that the Commission had no jurisdiction to make the order" involved in the case. The Court did not hold that the issue of the Federal Trade Commission's jurisdiction to enter the

order could not be raised in an action for penalties, though no petition to review it was ever filed. The Court did find and hold "The appeal is a frivolous one. Facts warranting the judgment were alleged in the complaint and admitted in the answer. Thus, instead of a defense, the answer was, in effect, a confession of judgment." The court actually passed on the defense of want of jurisdiction and found it to be without merit.

In *LaVerne Coop. Citrus Ass'n. v. United States*, 143 F. (2d) 415, 418, 420 (C.A. 9), (Comm. 24), this court in its opinion was careful to state "Appellants do not contest the constitutionality of the Act or the validity of order No. 53 *on its face*" (Emphasis added). And later in the opinion, it is emphasized "Again we note that we are not discussing *invalidity apparent on the face of such orders*".

Since the issue in the case at bar is "invalidity apparent on the face" of the Commission Opinion-Order of March 31, 1950, it would appear entirely clear that the *LaVerne* case is not relevant here.

In *Lichter v. United States*, 334 U. S. 742, 753, 790, 791, 792, affirming *Pownall v. United States*, 159 F (2d) 73 (C.A. 9) (Comm. 23, 25-26), the issues were defined by Mr. Justice Burton, speaking for the Court, as follows:

"We have two main issues before us: (1) the constitutionality of the Renegotiation Act on its face and (2) the finality of the determination of the excessive profits made under it in the absence of a petition filed with the Tax Court within the required time, seeking a redetermination of those profits In each case we uphold the constitutionality of the Act as providing the necessary authorization for the judgments rendered. We also accept the finality given by the courts below to the administrative determinations made of the excessive profits, although the statutory situation as a basis for the finality of such determinations is not precisely the same in each case. . . .

"It expressly stated that 'A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo*.' Sec. 403(e) (1). It provided also that '*In the absence of the filing of a petition with the Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order (of the Board) shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency.*' (Emphasis added)

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"No petitions were filed with the Tax Court in any of the cases before us, and the time for doing so has expired. . . .

"We uphold the decisions below and the contentions of the Government to the effect that the statutory provision thus made for a petition to the Tax Court was not, in any case before us, an optional or alternative procedure. It provided the one and only procedure to secure a redetermination of the excessive profits which had been determined to exist by the orders of the respective Secretaries or of the Board in the cases before us"

It is a far cry from the foregoing provisions of the Renegotiation Act to the actual provisions of the Power Act. There is nothing remotely similar in the two enactments. The issue in the *Lichter* case was the constitutionality of the Renegotiation Act *on its face* and the Supreme Court *passed upon* that issue in an action by the United States to recover alleged excess profits, notwithstanding the provision of Section 403(e) (1) above quoted. The question of constitutionality was *passed upon* to determine whether there was any legal foundation whatever for the Government's suit.

Woods v. Kaye, 175 F (2d) 886 (C.A. 9) arose under the Emergency Price Control Act of 1942, being an action by the Housing Expediter to compel restitution of rent overcharges. The landlord did not question the rent reduction except in its retro-

active aspect, i.e., the refund, and failed to properly follow the procedure of review provided in the Act.

Section 924(d) of the Act provides:

"The Emergency Court of Appeals shall have exclusive jurisdiction to determine the validity of any regulation or order of any price schedule, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the *validity* of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside any provision of this Act or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

The constitutionality of the Emergency Price Control Act, and particularly Section 924(d), was *passed upon* and upheld in *Bowles v. Willingham*, 321 U.S. 503, 526, in a suit brought by the Price Administrator to restrain further prosecution of state proceedings and violations of the Act. The Court held there was no constitutional objection to confining relief against orders of the Administrator to the Emergency Court of Appeals. It is odd that counsel should quote (Comm. 26) from the concurring opinion in that case of Mr. Justice Rutledge, who premised his concurrence in approving Section 924(d), as follows:

"In my opinion, Congress can do this, subject however to the following limitations or reservations which I think should be stated explicitly: (1) The order or regulation must not be invalid on its face. . . ."

Woods v. Kaye, supra, following *Bowles v. Willingham, supra*, held that *no forum* was open to the landlord under Section 924(d) except the Emergency Court of Appeals to which she failed to go for relief. Congress *expressly* provided but one forum under the Emergency Price Control Act, as under the Renegotiation Act upheld in *Lichter v. United States, supra*. In the Power Act exclu-

sive jurisdiction over all violations of that Act is vested in the District Court, as the court of enforcement, with no express or implied limitations of the broad equity powers of such court. The Court of Appeals, as the court of "review", is invested with no general jurisdiction. The "exclusive jurisdiction" of that court can attach only if, as, and when in a particular case the review procedures prescribed by Section 313 of the Act have been complied with.

Under the Renegotiation Act the War Contracts Price Adjustment Board is directed to enter into the renegotiation of contract price on determination of excess profits "whenever, *in the opinion of the Board*, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits" (U.S.C. Title 50, App. § 1191(c)) Therefore, conformably to the decision in *Shields v. Utah Idaho Cent. Ry. Co.*, 305 U.S. 177, 83 L. Ed. 111, 59 S. C. 160, such determination, even if wrong, does not defeat jurisdiction, for it still is "the opinion of the Board" which is the standard of jurisdiction fixed by Congress.

There is in the Renegotiation Act no prohibition of action prescribed within a defined statutory grant of power, as was present in the statute involved in *United States v. Idaho*, 298 U.S. 105, 80 L. Ed. 1070, 56 S.C. 690. There is an affirmative delegation of authority to the Contract Price Adjustment Board to proceed *on the basis of "the opinion of the Board,"* and nothing else. Under the Power Act, the jurisdiction of the Commission is not determined by "the opinion" of that body, but by the jurisdictional tests of Section 201(b) of the Act. See *Myers v. Bethlehem Corp.*, 303 U. S. 41, 49, 50, 82 L. Ed. 638, 643, 58 S.C. 459.

In *Yakus v. United States*, 321 U. S. 414, 88 L. ed. 834, 64 S.C. 660, the constitutionality of the Emergency Price Control Act was upheld, including the *express* exclusive statutory pro-

cedure for administrative and judicial review by the Emergency Court of Appeals. The Court in that case again pointed out that "There is no contention that the present regulation is void on its face . . ." (321 U.S. 447). The case is not authority here from any conceivable viewpoint.

Counsel stress the case of *United States v. Sing Tuck*, 194 U. S. 161, 48 L. Ed. 917, 24 S.C. 621, (Comm. 18-19). The controlling provision of the statute applicable in that case (Act, August 18, 1894; 28 Stat. at L. 390; Chap. 301, U.S. Comp. Stat. 1901, p. 1303) which has no counterpart in the Federal Power Act, reads as follows:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the *decision of the appropriate immigration or customs officers*, if adverse to the admission of such alien, *shall be final*, unless reversed on appeal to the Secretary of the Treasury." (Emphasis added).

In the anticipatory discussion by Commission counsel (Comm. 26-31) of the "cases cited by the Company", it is said that the same "were all cases in which the statute did not provide another, exclusive method of judicial review." The distinction sought to be made by counsel is vain and unrealistic. Section 313(b) of the Power Act relates to "review", while Section 317 thereof relates to "enforcement". They are not in conflict; nor is any part of Section 317 superseded by Section 313(b). Counsel indulge the pure assumption that the statutory "review" and the statutory "enforcement" are both "review". The provisions of the Act directly contradict such assumption. The District Court, as the enforcement court, expressly is vested with plenary and "exclusive jurisdiction over violations in all suits in equity and actions at law brought to enforce. . . ." In any enforcement proceeding, the first duty of the District Court is to determine whether the Commission order is valid, for if not, there is nothing to enforce.

CONCLUSION

The Commission was and is without jurisdiction under the Federal Power Act, the sole source of its authority:

To issue and cause to be served original process in the nature of a complaint and summons in an adversary action directing Arizona Edison to respond and appear before it;

To make and enter its Opinion-Order of March 31, 1950, in which it found Arizona Edison to be a "public utility" under said Act and directed it to comply with certain regulatory provisions of the Act.

The lack of Commission jurisdiction, both personal and subject matter, appears on the face of the Commission Opinion-Order of March 31, 1950, and in the Commission's Complaint in this enforcement proceeding.

The District Court, as the court of enforcement, has the authority and duty to examine and determine the jurisdiction of the Commission in the premises and the jurisdiction of the Court itself in the enforcement proceeding.

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

DONALD C. MCCREERY
1217 First National Bank Bldg.
Denver 2, Colorado

SNELL & WILMER
JAMES A. WALSH
703 Heard Building
Phoenix, Arizona

Attorneys for Appellee

12947
No. ~~12974~~

United States
Court of Appeals
For the Ninth Circuit.

CALIFORNIA VEGETABLE GROWERS, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

AUG 17 1951

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. **CLERK**

No. 12974

United States
Court of Appeals
For the Ninth Circuit.

CALIFORNIA VEGETABLE GROWERS, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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Santa Barbara, Calif.

For Appellee:

ERNEST A. TOLIN,
United States Attorney,

CLYDE C. DOWNING,
ROBERT K. GREAN,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

United States District Court, Southern District of
California, Central Division

No. 11423—Civil

CALIFORNIA VEGETABLE GROWERS, a Cor-
poration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes Now the plaintiff, California Vegetable Growers, by Schauer, Ryon & McMahon and Alfred D. Haines, as its attorneys, and alleges:

First Cause of Action

I.

The action arises under Section 1346 (a)(2), United States Code, Title 28, as hereinafter more particularly appears.

II.

At all times herein mentioned plaintiff was, and is, a corporation duly organized, existing, and authorized to do business under and by virtue of the laws of the State of California.

III.

That on or about the 13th day of December, 1946, in compliance with law, plaintiff sold and delivered to defendant, represented by and acting through the United States Army, and [2*] more specifically,

*Page numbering appearing at foot of page of original Certified Transcript of Record.

represented by and acting through the Quartermaster's Market Center, Los Angeles, California, three (3) carloads of celery, comprising one thousand four hundred ninety (1,490) crates of said commodity.

IV.

That the defendant then promised to pay Two Dollars and Thirty Cents (\$2.30) per crate for the said celery, or a total of Three Thousand Four Hundred Twenty-Seven Dollars (\$3,427.00).

V.

That said sale and delivery of said celery was made in accordance with an oral understanding and agreement arrived at by and between plaintiff and defendant at Guadalupe, California.

VI.

That, in accordance with said oral agreement and understanding, said 1,490 crates of celery were packed and shipped by plaintiff to the Property Officer, Quartermaster Market Center, Seattle, Washington, after said celery was first inspected at shipping point and found acceptable to defendant's agent and representative.

VII.

That, in accordance with said oral agreement and understanding, and at the direction and request of defendant, said celery was specially wrapped and packed in a manner unacceptable in commercial channels, and shipped to Seattle, Washington, via the Pacific Fruit Express Company on commercial

bills of lading which were to be converted, at destination, to Government bills of lading.

VIII.

That said celery arrived at Seattle, Washington, in due course, but said defendant did then and there refuse, and at all times since has refused, and now refuses to pay the agreed purchase price, or any part thereof, upon the alleged grounds that [3] said celery did not pass inspection at destination, to wit: Seattle, Washington.

IX.

That, by reason of the non-commercial wrap and pack of said celery, plaintiff was only able to sell said celery for freight charges plus the sum of Five Hundred Ninety-One Dollars and Two Cents (\$591.02).

X.

That prior to the filing of this complaint plaintiff exhausted all of its administrative remedies applicable to the subject matter hereof, in an attempt to recover the amount herein sued upon, and that this action is brought only after plaintiff was unsuccessful in recovering said amount by said methods.

Second Cause of Action

I.

As a second, separate and independent cause of action plaintiff realleges paragraphs I, II, III, V, VI, VII, IX and X of its first cause of action, and by such reference to said paragraphs makes them a part hereof.

II.

That said celery was reasonably worth the sum of \$3,427.00 but that said defendant refused to pay said sum, or any part thereof, when said celery arrived at Seattle, Washington, its point of destination, and at all times since has and now refuses to pay said sum, or any part thereof, upon the alleged grounds that said celery did not pass inspection at destination.

Wherefore, plaintiff prays judgment against defendant in the sum of \$3,427.00 less \$591.02, or, namely, the sum of Two Thousand Eight Hundred Thirty-Five Dollars and Ninety-Eight Cents (\$2,835.98), for costs of suit herein, and for such other and further relief as the Court deems just and proper in the premises.

SCHAUER, RYON &
McMAHON, and

ALFRED D. HAINES,

By /s/ ALFRED D. HAINES,

Attorneys for Plaintiff. [4]

State of California,

County of Santa Barbara—ss.

Leo T. McMahon, being first duly sworn, deposes and says:

That he is an officer, to wit: Vice President, of California Vegetable Growers, a corporation, the plaintiff in the above-entitled action, and makes this verification on behalf of said plaintiff; that he has read the foregoing complaint and knows the contents

thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes the same to be true.

/s/ LEO T. McMAHON.

Subscribed and sworn to before me this 11th day of April, 1950.

[Seal] /s/ MARTHA E. BLANCO,
Notary Public in and for the County of Santa
Barbara, State of California.

My commission expires July 6, 1951.

[Endorsed]: Filed April 12, 1950. [5]

[Title of District Court and Cause.]

ANSWER

Comes Now defendant United States of America, by Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Paul Fitting, Assistant United States Attorneys, for the Southern District of California, and in response to the Complaint herein alleges:

Answer to Plaintiff's First Cause of Action

I.

Defendant admits the allegations of Paragraphs I and II of the complaint.

II.

Answering Paragraphs III and IV of the com-

plaint, defendant admits that on or before December 13, 1946, the Quartermaster Market Center of the United States War Department at Guadalupe, California, requested bids for 1490 crates of fresh U. S. No. 1, 55#, celery for export, to be packed in a specified fashion, for shipment to Seattle, Washington, and to be subject to inspection for condition at such destination. Defendant further admits that plaintiff [6] submitted a bid to furnish such celery at a price of \$2.30 per crate, or a total price of \$3,427.00. The Quartermaster Market Center of the United States War Department accepted such bid on the condition that the celery be inspected for condition, and accepted, at destination, and thereafter issued three War Department Purchase Orders embodying the terms of said request, bid and acceptance.

III.

Answering Paragraphs V and VI, defendant admits that during the period from December 14, 1946, to December 16, 1946, and as a result of said request, bid and acceptance, plaintiff packed in three freight cars 1490 crates of celery and shipped said crates to the Property Officer, Quartermaster Market Center, Seattle, Washington. Defendant further admits that said celery was inspected by the United States Department of Agriculture, acting for defendant herein, at Lompoc, California, the point of origin of the shipments, and that said shipments were not rejected at that time.

IV.

Answering Paragraph VII, defendant admits that

the War Department Purchase Orders covering the celery provided, "Each stalk to be individually wrapped in parchment paper; wrapper to cover complete shank of stalk. Crate to be wired, strapped at each end for export." Defendant further admits that the celery was to be shipped to Seattle, Washington on commercial bills of lading, which were to be converted to Government Bills of Lading at destination.

V.

Answering Paragraph VIII, defendant admits that said celery arrived at Seattle, Washington on or about December 23 and 24, 1946; that said celery was inspected on said dates by the United States Department of Agriculture, acting for defendant herein, and found to be not in the condition called for by said request for bids, acceptance, and the purchase orders covering said celery, and further that no part of the \$3,427 price of said celery has been paid because of the condition of said celery.

VI.

Answering Paragraph IX, defendant has no information or belief upon [7] the subject of the allegations of Paragraph IX sufficient to enable it to answer them, and, placing its denial on that grounds, denies the allegations of Paragraph IX of the complaint.

VII.

Answering Paragraph X, defendant admits that the Comptroller General of the United States has

disallowed plaintiff's claims to the amount sued for hereunder.

VIII.

Further answering, defendant denies each and every allegation of the First Cause of Action of said complaint not hereinbefore specifically admitted.

Answer to Second Cause of Action

I.

Answering Paragraph I, defendant realleges Paragraphs I, II, III, IV, VI, and VII of its Answer to First Cause of Action, as fully as if they were set forth herein.

II.

Answering Paragraph II, defendant admits that said celery arrived at Seattle, Washington on or about December 23 and 24, 1946, that said celery was inspected on said dates by the United States Department of Agriculture, acting for defendant herein, and found to be not in the condition called for by said request for bids, acceptance, and purchase orders covering said celery, and further that no part of the \$3,427 price of said celery has been paid because of the condition of said celery.

III.

Further answering, defendant denies each and every allegation of the Second Cause of Action of said complaint not heretofore specifically admitted.

First Separate Defense

As a first and independent defense, defendant alleges as follows:

I.

On or about December 13, 1946, the Quartermaster Market Center of the United States War Department requested bids for 1490 crates of fresh, [8] U. S. No. 1, 55#, matured celery, to be packed in a specified manner and for export, to be shipped to the Property Officer, Quartermaster Market Center, Seattle, Washington, and to be subject to inspection for condition, and acceptance, at Seattle, Washington.

II.

On or about December 13, 1946, plaintiff submitted a bid to furnish such celery at a price of \$2.30 per crate, or a total price of \$3,427, and the Quartermaster Market Center of the United States War Department accepted such bid on the condition that the celery be inspected for condition at destination and accepted there, and issued three War Department Purchase Orders covering such celery.

III.

Plaintiff packed and shipped from Lompoc, California, to the Property Officer, Quartermaster Market Center, Seattle, Washington, in response to said acceptance, 1490 crates of celery, which crates of celery arrived at Seattle on or about December 23rd and 24th, 1946.

IV.

On or about December 23rd and 24th, 1946, said

celery was inspected on behalf of the defendant by inspectors of the United States Department of Agriculture, and found to be not in the condition called for, but to be off condition and suffering from blight and decay, not suitable for export, and not U. S. No. 1 grade celery.

V.

Promptly upon learning of such inspection, the Quartermaster Market Center of the United States War Department caused notice thereof to be given plaintiff, rescinded the agreement, and requested that plaintiff receive back said celery. Plaintiff thereupon took possession again of said celery.

Second Separate Defense

I.

As a second and independent defense, defendant alleges: [9]

Defendant realleges the allegations of Paragraphs I through IV of its First Separate Defense as fully as if set forth herein.

II.

Plaintiff warranted that the celery in said 1,490 crates so shipped was fresh U. S. No. 1, matured, 55#, celery, suitable for export.

III.

Said celery was not as warranted.

Third Separate Defense

As a third and independent defense, defendant alleges as follows:

I.

Defendant incorporates herein Paragraphs I through IV of its First Separate Defense as fully as if set forth herein.

II.

Plaintiff herein failed to comply with the terms of said request for bids, bid, and acceptance, and of the War Department Purchase Order, in that plaintiff failed to deliver 1490 crates of U. S. No. 1, fresh, matured, 55#, celery, suitable for export.

Wherefore, defendant herein prays that the plaintiff take nothing by its complaint; that defendant herein be awarded its costs of suit, and for such other relief as may be appropriate and just in the premises.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Asst. United States Attorney,
Chief, Civil Division.

PAUL FITTING,
Asst. United States Attorney.

/s/ PAUL FITTING,
Asst. United States Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 14, 1950. [10]

[Title of District Court and Cause.]

STIPULATION OF FACTS AND ORDER

It Is Hereby Stipulated by and between plaintiff, California Vegetable Growers, through its counsel, Alfred D. Haines and Schauer, Ryon & McMahon, and defendant, United States of America, through its counsel, Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Paul Fitting, Assistant United States Attorneys, for the Southern District of California, as follows:

I.

Plaintiff, California Vegetable Growers, was at all the dates mentioned in this stipulation, and now is, a corporation duly organized, existing, and authorized to do business under the laws of the State of California.

II.

On or before December 13, 1946, the Quartermaster Market Center of the United States War Department at Guadalupe, California, orally requested bids for 1490 crates of fresh, U. S. No. 1, 55# celery for export. Said bids specified the manner of wrapping, [12] packing and icing, the wrap and pack specified being of a type not used in commercial channels.

III.

On December 13, 1946, plaintiff submitted a bid to furnish such celery at a price of \$2.30 per crate, or a total of \$3,427.00, delivery to be "F.O.B. origin," (however, defendant contends delivery to be "F.O.B. origin, but subject to inspection at destination") and the Quartermaster Market Cen-

ter of the United States War Department accepted such bid.

IV.

Thereafter, 500 crates of such celery were packed in Car SFRD 3086. These crates were inspected by an inspector of the United States Department of Agriculture, at Lompoc, California, between 2:00 p.m., December 14, 1946, and 9:00 a.m., December 16, 1946, acting on behalf of the defendant, United States of America. A copy of Inspection Certificate 65049 covering such inspection is attached hereto as a part of this stipulation.

V.

Thereafter, 490 crates of such celery were packed in Car PFE 41017. These crates were inspected by an inspector of the United States Department of Agriculture, at Lompoc, California, between 3:30 p.m., December 14, 1946, and 10:30 a.m., December 16, 1946, acting on behalf of the defendant, United States of America. A copy of Inspection Certificate 65048 covering such inspection is attached hereto as a part of this stipulation.

VI.

Thereafter, 500 crates of such celery were packed in Car PFE 45854. These crates were inspected by an inspector of the United States Department of Agriculture, at Lompoc, California, between 1:00 p.m., December 14, 1946, and 3:30 p.m., December 14, 1946, acting on behalf of the defendant, United States of America. A copy of Inspection Certificate 65025 covering such inspection is attached hereto as a part of this stipulation. [13]

VII.

It was part of the purchase agreement that: "Each stalk to be individually wrapped in parchment paper: wrapper to cover complete shank of stalk. Crate to be wired, strapped at each end for export," and that the celery was so wrapped and packed and shipped to Seattle, Washington, F.O.B., on commercial bills of lading, which were to be converted to Government bills of lading at destination, in accordance with the request and direction of the defendant.

VIII.

The three above carloads of celery were thereafter transported by rail from Lompoc, California, to Seattle, Washington.

Car SFRD 3086 left Lompoc, California, on December 16, 1946, and arrived at Seattle, Washington, at 3:50 p.m. on December 23, 1946, as shown by PFE's record of arrival, a copy of which it attached hereto as a part of this stipulation.

Car PFE 41017 left Lompoc, California, on December 16, 1946, and arrived at Seattle, Washington, at 3:50 a.m. on December 23, 1946, as shown by PFE's record of arrival, a copy of which is attached hereto as a part of this stipulation.

Car PFE 45854 left Lompoc, California, on December 14, 1946, and arrived at Seattle, Washington, at 1:35 a.m. on December 21, 1946, as shown by PFE's record of arrival, a copy of which it attached hereto as a part of this stipulation.

IX.

At 11:30 a.m., on December 24, 1946, the celery

contained in Car SFRD 3086 was inspected at Seattle, Washington, by an inspector of the United States Department of Agriculture, acting on behalf of the defendant herein. A copy of such Inspection Report No. D-43196 is attached hereto and made a part of this stipulation.

At 2:15 p.m., on December 27, 1946, the celery contained [14] in Car SFRD 3086 was again inspected at Seattle, Washington, by an inspector of the United States Department of Agriculture at the request of the plaintiff herein, and the result of said inspection is set forth in Inspection Certificate B-46844, a copy of which is attached hereto and made a part of this stipulation.

X.

At 10:30 a.m., on December 24, 1946, the celery contained in Car PFE 41017 was inspected at Seattle, Washington, by an inspector of the United States Department of Agriculture, acting on behalf of the defendant herein. A copy of such Inspection Certificate No. D-43195 is attached hereto and made a part of this stipulation.

At 3:15 p.m., on December 27, 1946, the celery contained in Car PFE 41017 was again inspected at Seattle, Washington, by an inspector of the United States Department of Agriculture at the request of the plaintiff herein, and the result of said inspection is set forth in Inspection Certificate B-46845, a copy of which is attached hereto and made a part of this stipulation.

XI.

At 2:40 p.m., on December 23, 1946, the celery

contained in Car PFE 45854 was inspected at Seattle, Washington, by an inspector of the United States Department of Agriculture, acting on behalf of the defendant herein. A copy of such Inspection Certificate No. D-43243 is attached hereto and made a part of this stipulation.

This car was again inspected at 10:15 a.m. on December 26, 1946, by an inspector of the United States Department of Agriculture at the request of the plaintiff herein, and the result of such inspection is set forth in Inspection Certificate B-46839, a copy of which is attached hereto and made a part of this stipulation. [15]

On December 23, 1946, there were typed three War Department purchase orders by the Quartermaster Market Center referring to the three cars above described. Copies of these orders are attached hereto and made a part of this stipulation. These purchase orders were thereafter mailed to plaintiff herein. It is understood that plaintiff's position is that: said purchase orders are not binding upon the plaintiff, and that they do not constitute the agreement of the parties, and further, that they do not correctly set forth said agreement.

XIII.

Defendant herein refused to accept delivery of any of the celery shipped in the above cars, and has paid no part of the price thereof.

XIV.

Subsequent to the rejection by defendant, plaintiff sold said celery for freight charges plus the sum of \$591.02.

XV.

The parties by this stipulation do not stipulate that all the terms of the purchase orders are set forth herein, and it is the intention of all the parties to leave open for proof at the time of trial what may have been the terms and provisions agreed upon by the parties orally and/or otherwise, and particularly the provisions as to inspections, except as herein specified. Both parties also reserve the right to present additional evidence at time of trial in reference to the matters herein stipulated to and/or matters not covered by this stipulation.

Dated: January 25th, 1951.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division.

/s/ ROBERT K. GREAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

/s/ ALFRED D. HAINES,
SCHAUER, RYON &
McMAHON,
Attorneys for Plaintiff. [16]

Order

It is so ordered this 29th day of January, 1951.

/s/ JAMES M. CARTER,
U. S. District Judge. [17]

COPY

Form FDA-10a (California)
(Superseding FPI-30)UNITED STATES DEPARTMENT OF AGRICULTURE
STATE OF CALIFORNIA,
DEPARTMENT OF AGRICULTURE

65049

INSPECTION CERTIFICATE

This certificate is issued in compliance with the regulations of the Secretary of Agriculture governing the inspection of various products pursuant to the act making appropriations for the United States Department of Agriculture and the California Fruit and Vegetable Certification Legislation, and is admissible as prima facie evidence in all courts of the United States and of California. This certificate does not excuse failure to comply with any of the regulatory laws enforced by the United States Department of Agriculture or the Federal Food and Drug Administration.

Inspection point Imperial, Calif. Kind of car Refrigerator Car initials and number W 222 200

Inspection begun 2:00 P.M., Dec. 14, 1936 Completed 3:00 A.M., December 16, 1936
(Hour, date) (Hour, date)

Applicant California Vegetable Growers Address Santa Barbara, Calif.

Shipper Same Address Same

I, the undersigned, on the date above specified made personal inspection of samples of the lot of products herein described, and do hereby certify that the quality and/or condition, at the said time and on said date, pertaining to such products, as shown by said samples, were as stated below:

Condition of car: Hatch covers closed, plugs in, lockers empty.

Products: CELERY, French type; Manufactured 500 wire bound 16 inch crates
standard PICHARDSON #1 - #55.

Loading: Through load, 3 to 5 wide, 3 to 6 high. Crushed top 1 in.

Pack: Mostly fairly tight, some slack. Stalks wrapped.

Size: Irregular.

Quality and condition: Celery fresh, crisp and well trimmed. Stalks green solid.
 Tops fresh and green. Hearts fairly well formed.
 Defects range from 7% to 20%, averaging approximately 12%; consisting mostly
 of worm damage or mechanical injury. No decay.

Grade: Averages approximately 80% U.S. No. 1 quality, Green.



L. Martinez

Inspector.

COPY

FD-106 (California)
 (Revising PP-10)

UNITED STATES DEPARTMENT OF AGRICULTURE
 STATE OF CALIFORNIA,
 DEPARTMENT OF AGRICULTURE

65048

INSPECTION CERTIFICATE

This certificate is issued in compliance with the regulations of the Secretary of Agriculture governing the inspection of various products purchased in the and the supervision for the United States Department of Agriculture and the California Fruit and Vegetable Certification Legislation and is admissible as prima facie evidence in all courts of the United States and of California. This certificate does not excuse failure to comply with any of the regulatory laws enforced by the United States Department of Agriculture or the Federal Food and Drug Administration.

Inspection point Imperial, Calif. Kind of car Refrigerator Car initials and number WPA 4017

Inspection begun 1:30 P.M., Dec. 14, 1936 Completed 10:31 A.M., December 16, 1936
 (Hour, date) (Hour, date)

Applicant California Vegetable Growers Address Santa Barbara, Calif.

Shipper Same Address Same

I, the undersigned, on the date above specified made personal inspection of samples of the lot of products herein described, and do hereby certify that the quality and/or condition, at the said time and on said date, pertaining to such products, as shown by said samples, were as stated below.

Condition of car: Hatch covers closed, bins in, bunkers empty.

Products: CELERY, Pascal type; Manifested by 50 wire bound 16 inch crates
Standard LADO #1 - A55 and RICHARD #1 - A55.

Loading: Through load, 3 to 5 wide, 3 to 6 high. Crushed top 10%.

Stalks: Mostly fairly tight, some slack. Stalks wrapped.

Size: Irregular.

Quality and condition: Celery fresh, crisp and well trimmed. Stalks green color.
 Tops fresh and green. Hearts fairly well formed.
 Defects range from 5% to 20%, averaging approximately 12%; consisting mostly
 of worm damage or mechanical injury. No decay.

Grade: Averages approximately 80% U.S. No. 1 quality. Green.



L. Martinez

Inspector.

Z-2442

COPY

In (for California)
(Use PP-100)

UNITED STATES DEPARTMENT OF AGRICULTURE

STATE OF CALIFORNIA,
DEPARTMENT OF AGRICULTURE

65025

INSPECTION CERTIFICATE

This certificate is issued in compliance with the regulations of the Secretary of Agriculture, governing the inspection of various products pursuant to the act of Congress for the United States Department of Agriculture and the California Fruit and Vegetable Certification Legislation, and is admissible as prima facie evidence in all courts of the United States and of California. This certificate does not entitle holder to comply with any of the regulatory laws enacted by the United States Department of Agriculture or the Federal Food and Drug Administration.

Inspected at Los Angeles, Calif. Kind of car refrigerator Car initials and number PTA 19974
 Inspection begun 1:00 P.M., Dec. 14, 1946 Completed 1:30 P.M., December 14, 1946
 (Hour, date) (Hour, date)
 Agent California Vegetable Growers Address Route 2, Burbank, Calif.
 Inspector W. H. H. H. Address W. H. H. H.

I, the undersigned, on the date above specified, made personal inspection of samples of the lot of products herein described, and do hereby certify that the lot or condition, at the said time and on said date, pertaining to such products, as shown by such samples, were as stated below:

Kind of car: Batch 20755 0-50, 1-100, 2-100, 3-100, 4-100.

Contents: CELERY, French type; Modified 500 - 16 inch wire bound crates
Shipped 1946 11 - 1946.

Weight: Through load, 3 to 7 wide, 4 to 6 high. Crushed top 100.

Mostly fairly tight, many slack. Stalks individually wrapped.

Irregular - Stalks generally clipped.

Quality and condition: Very fresh, crisp and well trimmed. Stalks generally
green color. Tops fresh and green. Hearts fairly well formed.
Defects range from 5% to 25%, averaging approximately 14%; consisting of
some damage, remainder mostly mechanical injury or poorly formed hearts.
Heavy.

Averages approximately 55% U.S. No. 1 quality. Green.



T. H. H. H.

Inspector.

PACIFIC FRUIT EXPRESS COMPANY

REQUEST FOR CONFIRMATION OF DIVERSION ORDER OR FOR DISPOSITION OF SHIPMENT

Calif Fruit Bros
Guadalupe

Guadalupe Calif

Gentlemen:

1. Refers to telephone conversation 1457 M date, 19 1946
with Bill May:
2. Kindly mail confirmation of your telephone conversation requesting diversion of car
to _____
3. Please furnish immediate advice as to disposition of car _____

now on track at _____, or advise this office
in that connection.Remarks: RD 3086 arrived Seattle 350 pm Dec 23, 1946J McCutchen
(Name)

12-25-46W

FORM 25-1-PPE

PACIFIC FRUIT EXPRESS COMPANY

REQUEST FOR CONFIRMATION OF DIVERSION ORDER OR FOR DISPOSITION OF SHIPMENT

Calif Fruit Bros
GuadalupeFile 5039
Guadalupe 12-26-46

Gentlemen:

1. Refers to telephone conversation 4567 M date, 19 1946
with Mr Brown:
2. Kindly mail confirmation of your telephone conversation requesting diversion of car
to _____
3. Please furnish immediate advice as to disposition of car _____

now on track at _____, or advise this office
in that connection.Remarks: Box 41017 Lompoc 12/16 arrived Seattle 350am
and refused account conditionJ McCutchen
(Name)

PACIFIC FRUIT EXPRESS COMPANY

REQUEST FOR CONFIRMATION OF DIVERSION ORDER OR FOR DISPOSITION ~~SHIPMENT~~*Calif Dept Agr*
*Extradupe**FL 5-5023**Extradupe 12-26-46*

Gentlemen:

1. Refers to telephone conversation with *Mr. Dunn*;

*11a**acts*

M. _____, 19____

2. Kindly mail confirmation of your telephone conversation requesting diversion of car.

to _____

PAGE 45854

3. Please furnish immediate advice as to disposition of car.

now on track at *Seattle*
in that connection.

, or advise this office

Remarks:

*Arrived 135am 2/21st refused account**condition**E. J. McCutcheon*

(Name)

UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON STATE DEPARTMENT OF AGRICULTURE

D-43196

INSPECTION CERTIFICATE

Inspected, at the date above specified made personal inspection of samples of the lot of products herein described, and do hereby

point *Seattle Wash.* Hour *11:30 A.* M. Date *Dec 24, 1946*
Q.M. Market Center Address *Seattle Wash.*
Address

Investigated, at the date above specified made personal inspection of samples of the lot of products herein described, and do hereby

R.D. 3086 *Lot 8259* Destination *Seattle Wash.*

above number and kind containers, brands, marks, pack, size, quality condition, grade:

banits Count 500 min brand crates Pearl type Cherry
ch, crisp, tops mostly green; some turning yellow to
tan. Blight ranges 8 to 15% orange 11/14%
4% decay

marks. This inspection restricted to determine only
in R.D. 3086 at Quarter Market Cold Storage
Seattle Wash.

01/25 350

Quantities quoted are from Q. M. C. Form No. 206
and not necessarily actual quantities delivered

E. D. Watkins

Inspector

FDA-403
(Using FPI-1)

ORIGINAL

UNITED STATES DEPARTMENT OF AGRICULTURE

WASHINGTON, D. C. 20250
Division of Production & Marketing Admin.

INSPECTION CERTIFICATE

This certificate is admissible in all Courts of the United States as prima facie evidence of the truth of the statement therein contained. This certificate does not excuse failure to comply with any of the regulatory laws enforced by the United States Department of Agriculture or the Federal Food and Drug Administration.

B- 46844
B- 46844

Market Seattle, Wash. Date Dec. 27, 1946 Hour 2:15 P.M.

California Vegetable Growers Address Guadalupe, Calif.

(Applicant)

Same Address Same

Q M M O Address Seattle, Wash.

That in accordance with instructions issued by the Secretary of Agriculture pursuant to authority conferred upon him by law, I inspected the samples and on the date stated above, samples of the following lot of products, and that the quality and/or condition as shown by said samples, at and on said date, were as stated below:

N.P.R.R.

Kind Refrigerator Where Inspected Team Track

on of car: Hatch covers closed, plugs in, bunkers full of ice.

inspected and distinguishing marks: Pascal type C E L E R Y in wirebound crates stenciled "Richardson QM-55". Manifested as 500 crates.

on of load and containers: Through load, each end, 5 rows, 6 layers, irregular loading between doors. 4 to 18 inches crushed ice over top and crushed ice also at sides of load.

on of pack: Tightly tight. Each stalk wrapped.

nature of product: Bottom layer 32°, top layer 32° F.

generally fairly uniform. Stalks generally clipped to 16 inches. Average midrib length 6 to 11 inches, mostly 6 to 9 inches.

mostly fairly good

Stalks are generally well developed, fairly good to good/heart formation, n, fairly good to good green color, well trimmed. Grade defects average well in tolerance.

Stock is mostly fresh and crisp, tops mostly good green color, few turning yellow. Damage from blight averages 1%. Some tops slightly affected with blight not affecting grade. 1% fresh worm injury with live worms present. 1% damage from discoloration following bruising. Decay in tops ranges in samples from 15% to 20%, in many samples none; averages 8%, chiefly Bacterial rot, mostly in initial stages, many advanced and many following blight. Decay on main branches averages 2%.

Now falls to grade U.S.No.1 Green only account decay, but now contains approximately 85% U.S.No.1 Green quality; 10% decay.

Inspection and certificate restricted to product and lading between, and in 4 stacks nearest each side of, doors.



Fee \$5.00

Expenses

Total \$5.00

D. M. Bard *W. M. Brooks*
D. M. Bard W. M. Brooks Inspector.

Address 228 Federal Office Bldg. Seattle, Wash.

PLEASE REFER TO THIS CERTIFICATE BY NUMBER AND MARKET

UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON STATE DEPARTMENT OF AGRICULTURE

D-431957

INSPECTION CERTIFICATE

made prima facie evidence in courts of Washington and the United States but does not relieve holder from compliance with laws.

Point Seattle, Wash Hour 10:30 A.M. Date Nov 24, 1946
Q.M. Market Center Address Seattle, Wash.
 Address _____

designated, on the date above specified made personal inspection of samples of the lot of products herein described, and do hereby certify the quality and/or condition, at the said time and on said date, pertaining to such products, as shown by said samples, were as follows:

Trailer, semitrailer. License LA 8860 Destination Seattle, Wash.

Show number and kind containers, brands, marks, pack, size, quality, condition, grade:

1000's count (500) 112: bounet half cts bcting
crisp type mostly green some turning to
red. Defect ranges to 10% averaging 16%
any ranges to 10% averaging 5%

This inspection restricted to down spray only
at Q.M. Cold storage plant.
24, 1946.

470-#350 Quantities quoted are from Q. M. C. Form No. 506
 and not necessarily actual quantities delivered.

Campbell Kennedy
 Inspector

UNITED STATES DEPARTMENT OF AGRICULTURE

FOOD ADMINISTRATION
OFFICE OF INSPECTION

Production and Marketing Adm.

INSPECTION CERTIFICATE

This certificate is admissible in all Courts of the United States as prima facie evidence of the truth of the statement therein contained. This certificate does not excuse failure to comply with any of the regulatory laws enforced by the United States Department of Agriculture or the Federal Food and Drug Administration.

B- 46845

B- 46845

Market Seattle, Wash.

Date Dec. 27, 1946

Hour 3:15 P.M.

California Vegetable Growers

Address Guadalupe, Calif.

Same

Address Same

Q M M C

Address Seattle, Wash.

This certificate is issued pursuant to instructions issued by the Secretary of Agriculture pursuant to authority conferred upon him by law. It is issued on the date stated above, samples of the following lot of products, and that the quality and/or condition as shown by said samples at the time and date, were as stated below:

Kind of car Refrigerator Where N.P.R.R.
Inspected Team Track

of car: Hatch covers closed, plugs in, ice approximately 6 inches from top in each bunker.

inspected and Pascal type C E L E R Y in wirebound crates stenciled "Noma" and "Richards" marks: QMI A 35" or "Richardson QMI A 55". Manifested as 500 crates.

Through load, each end, 5 rows, 6 layers, irregular loading between doors. Crushed ice at sides and 4 to 24 inches crushed ice over top of load.

of pack: Generally tight. Each stalk wrapped.

ature of product: Bottom layer 33°, top layer 33° F.

fairly uniform. Stalks generally clipped to 16 inches, average midrib length to 11, mostly 6 to 9 inches.

Generally well developed, fairly good to good, mostly fairly good heart formation, clean, fairly good to good green color, well trimmed. 5% grade defects, mostly poorly trimmed, poor heart formation or cutworm injury.

Generally fresh and crisp, tops generally green. 1% fresh worm injury with live worms present. Some tops slightly affected with blight not affecting grade. Many samples show approximately 10% decay affecting tops, many of which are following blight, in most samples no decay in tops, averages 4%. Less than 1% decay affecting lower main branches. Decay is chiefly Bacterial Soft Rot initial stages.

now fails to grade U. S. No. 1 Green only account decay but now contains approximately 90% U. S. No. 1 Green quality; 5% decay.

Inspection and certificate restricted to product and lading between, and in 4 stacks nearest each side of, doors.



Fee \$5.00

Expenses

Total \$5.00

D. M. Hurd *W. M. Brooks*
D. M. Hurd W. M. Brooks Inspector.

Address 228 Federal Office Bldg. Seattle, Wash.

PLEASE REFER TO THIS CERTIFICATE BY NUMBER AND MARKET

Form FDA-404
(Revision FPI 1)

UNITED STATES DEPARTMENT OF AGRICULTURE

U.S. FOOD ADMINISTRATION
OFFICE OF DISTRIBUTION

Production & Marketing Adm.

ORIGINAL

INSPECTION CERTIFICATE

This certificate is admissible in all Courts of the United States as prima facie evidence of the truth of the statement therein contained. This certificate does not excuse failure to comply with any of the regulatory laws enforced by the United States Department of Agriculture or the Federal Food and Drug Administration.

B- 46839
B- 46839Market Seattle, Wash. Date Dec. 26, 1946 Hour 10:15 A.M.California Vegetable Growers Address Guadalupe, Calif.(Applicant)
California Vegetable Growers Address Guadalupe, Calif.Q. A. K. C. Address Seattle, Wash.

I certify that in accordance with instructions issued by the Secretary of Agriculture pursuant to authority conferred upon him by law, I inspected, on and on the date stated above, samples of the following lot of products, and that the quality and/or condition as shown by said samples, at said time and date, were as stated below:

Initials F F E 4 5 8 5 4 Kind Refrigerator Where Milwaukee Railroad
Number F F E 4 5 8 5 4 of car Refrigerator inspected Hold track.

Condition of car: Hatch covers closed, plugs in, ice in bunkers to within 1-1/2 feet of top.

Products inspected and distinguishing marks: Pascal type C E L E R Y in wirebound crates stenciled "LADD MI A56." Manifested as 500 crates.

Condition of load and containers: Through load, in each and 4 layers, 4 to 9 rows, doorway being irregular. From 6 to 10 inches crushed ice over approximately 1/2 of top
Condition of pack: Generally fairly tight. Each stalk layer crates.
individually wrapped.

Temperature of product: Bottom layer 33°, top layer 35° F.

Generally fairly uniform. Stalks generally clipped to 16 inches. Average stalk length 6 to 11 inches, mostly 6 to 9 inches.

Quality: Stalks are generally well developed, generally with good heart formation. Generally clean, generally good green color and well trimmed. Grade defects well within tolerance.

Stock free from decay is fresh and crisp. Tops mostly green, few turning yellow. Damage from discoloration following bruising averages 1%. Decay condition: in tops ranges from 0% to 35%, averages approximately 20%, chiefly Bacterial Soft rot, mostly in initial stages, many advanced. In many stalks decay in tops is following Blight. Decay in lower main branches ranges in samples from 4% to 12%, in some samples none, averages 5%, chiefly Watery Soft mostly in initial stages.

Remarks: Now fails to grade U. S. No. 1 Green only account decay, but now contains approximately 70% U.S. No. 1 Green quality; 25% decay.

Remarks: Inspection and certificate restricted to product and lading between, and upper 2 layers of 4 stacks each side of, doors.



Fee \$5.00
Expenses _____
Total \$5.00

H. M. Brooks
W.M. Brooks Inspector.
Address 228 Federal Office Bldg., Seattle, Wash.

PLEASE REFER TO THIS CERTIFICATE BY NUMBER AND MARKET

ARMY DEPARTMENT PURCHASE ORDER

is authorized by the First War Power Act, 1941 (Public No. 254, 77th Congress) and No. 648 (Dec. 27, 1941) and the Act of July 2, 1940 (Public No. 703, 76th Congress) by the Act of June 8, 1943 (Public No. 630, 77th Congress).

Quartermaster Market Center
111 W. Seventh St., P.O. Box 6480
Los Angeles 55, California

and address; also factory address if required)

California Vegetable Growers,
P. O. Box 777
Guadalupe, Calif.

Property Officer
Quartermaster Market Center
Seattle, Wash.
c/o "Palisann" Pier #36,
Seattle, Wash.

DATE 13 Dec 46		CONTRACT NO. (if any)
SHEET NO. 1	T.O. OF SHEETS 2	ORDER NO. LOS A 8259

REQUESTION NO. 45-064-66-47	DISPATCH NO. Seattle No. 1192
--------------------------------	----------------------------------

PAYMENT WILL BE MADE BY FINANCE OFFICE, U.S. ARMY, AT:
Los Angeles, Calif.

INVOICE FOR PAYMENT WILL BE MAILED TO:
111 W. 7th St., P.O. Box 6480
Los Angeles 55, Calif.

The receipting and services to be obtained by this instrument are authorized by, and for the purposes set forth in, and are chargeable to the following accounts, the available balances of which are sufficient to cover the cost thereof:

707-6135 P 121-08
A 216/70504 S 04-089

PRICE WITH YOURS AND SPECIAL QUOTATION/ACCOMMODATION OF 13 December 1946
WITH THE FOLLOWING ON THE TERMS SPECIFIED ON BOTH SIDES OF THIS PAGE AND ON THE ATTACHED SHEETS, IF ANY, INCLUDING
P.B. Freight:

PRESENTING INVOICES OR VOUCHERS, AND OF PACKING, MARKING, AND SHIPPING, SHALL DIVIDED HEREIN, EXCEPT AS OTHERWISE DIRECTED BY THE CONTRACTING OFFICER. Ship on	DISCOUNT TERMS
1 E/ to be converted to Gov't B/L at destination	none

DELIVERIES 23 December 1946	INSPECTION POINTS Inspection and acceptance at destination
--------------------------------	--

SUPPLIES OR SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
CELERY, 55#, matured, tight pack, (27500) 86% U.S. No. 1	500	crt	2.30	\$1,150.00

Each stalk to be individually wrapped in parchment paper, wrapper to cover complete shank of stalk - crate to be wired, strapped at each end for export and Marked: Ft. Richardson - QM-A55.

Unit price includes tax ice/ Re-iced at GERMER
Federal State inspected

The above commodity is subject to acceptance in accordance with Q.M.Mkt. Ctr. Operating Manual, Par. 3005.

Carlot No. 3770 ROUTING: SP MP
Shipped 12/16/46 in Car No. SPED 3086

Contractor shall give prepaid notice of shipment to Q.M.Mkt. Ctr., Seattle Port of Embarkation, Bldg. 13, 1049 South Alaskan Way, Seattle 4, Wash. As prescribed in Special Condition No. 6 attached.

F.B.O. Guadalupe

TOTAL				
UNITED STATES OF AMERICA				
BY <i>K. W. Alexander</i>				
K. W. ALEXANDER, 1st Lt., QMC				
CONTRACTING OFFICER				

EXHIBIT B

13 Dec 46		DO. TRACT NO. (11 reg)	
1		2	
ISSUATION NO. 45-064-66-47		ORDER NO. LOC A 8261	
Quartermaster Market Center 111 W. Seventh St. P.O. Box 6430 Los Angeles 55, California		These checked commodities shall remain in all packages and papers subject to this order.	
California Vegetable Growers P.O. Box 717 Bualupe, California		SHIPPING NO. Seattle No. 1194	
Property Officer Quartermaster Market Center Seattle, Washington c/o "Falsiana" Box 456, Seattle, Washington		PAYMENT WILL BE MADE BY FINANCE OFFICER, U.S. ARMY, AT Los Angeles, California	
		FINANCE FOR PAYMENT WILL BE MAILED TO: 111 W. 7th St., P.O. Box 6480 Los Angeles 55, California	
		The supplies and services to be obtained by this instrument are authorized by one of the persons authorized to act on behalf of the contracting department, the complete list of which are subject to cover the cost through 707-6135 P 111-08 + 216/70504 S 04-089	
13 December 1946			
YOUR VERBAL QUOTATION/UNDERSTANDING OF FOLLOWING ON THE TERMS SPECIFIED ON BOTH SIDES OF THIS PAGE AND ON THE ATTACHED SHEET, IF ANY, ENCLOSURE			
Or gln			
C INVOICES OR VOUCHERS, AND OF PACKING, MARKING, AND SHIPPING, SHALL BE SUBJECT TO OTHERWISE DIRECTED BY THE CONTRACTING OFFICER.			
B/L to be converted to Gov't B/L at Destination.			
DISCOUNT TERMS None			
23 December 1946		INSPECTION FORMS - Inspection and Acceptance at Destination.	
SUPPLIES OR SERVICES		QUANTITY	UNIT
ELETRY, 554, Fresh, matured, tight pack, (27500) B. & U.S. No. 1 each stalk to be individually wrapped in parchment paper; wrapper to cover complete shank of stalk. Crate to be wired, strapped at each end for Export.		500	Crt.
MARKS: LADU-DNT-456		UNIT PRICE	AMOUNT
Unit price includes top ice. To be received at Harbor.		2.30	\$1,150.00
Federal State Inspected.			
The above commodity is subject to acceptance in accordance with U.S. Market Center Operating Manual, Paragraph 3005.			
LOT NO. 3772 - ROUTING: SP NP			
Shipped 12/14/46 in Car No. FFE-45854			
The Contractor shall give prepaid notice of shipment to: Quartermaster Market Center, Seattle Port of Embarkation, Bldg. 13, 949 South Alaskan Way, Seattle 4, Washington.			
B O - QUADALUPE			
		TOTAL	
		UNITED STATES OF AMERICA	
		BY <i>[Signature]</i> K. E. ALEXANDER, 1st Lt., U.S.A.C.	
		CONTRACTING OFFICER	

Typed - 12/23/46 gw

28 94891

Die in der Tabelle angegebenen Werte sind die Mittelwerte der Messungen der verschiedenen Proben. Die Werte in der Klammer geben die Standardabweichung an. Die Werte in der Spalte "Berechnung" sind die Werte, die aus den Messungen berechnet wurden. Die Werte in der Spalte "Literatur" sind die Werte, die in der Literatur angegeben sind.

W. H. PERKINSON AND LEONARD W. CARR, in the Department of Chemistry, University of Illinois at Chicago, Chicago, Illinois 60607

[illegible]

(b) If supplies are fresh fruits and/or vegetables, the manufacturer shall be subject to compliance in accordance with QuickScan® Market Center (QuickScan Market, Inc., #950).

(c) If supplies are produce, fruits and/or vegetables, cooperative shall be subject to the following:

(13) French literature is of the lowest trip and I have prepared, instead of a French literature course, a course in the history of the French language. The result shall be a course in the history of the French language and in accordance with a general historical and literary background. The result shall be a course in the history of the French language and in accordance with a general historical and literary background. The result shall be a course in the history of the French language and in accordance with a general historical and literary background.

12. DATE OF RECEIPT - If the applicant specified in this column are used, the F-100 must be used with the same identification number and the number of all previous.

15. **SHADES OF GREEN**—Unique colorfastness. It is the only color of this category now on all sizes of pleated skirts. The colorfastness is guaranteed with the new weight. are wrapped up and in boxes or packages. The colorfastness is guaranteed with the new weight. please at Home, Retail and Dept. Stores will be shipped with the new weight.

[illegible]

(b) Eggs to be shipped in less than sealed condition. If such eggs are imported at all times, the Government will accept the supplier at destination at the Government's sole discretion. The Government will accept eggs, as determined by inspection at destination, if the supplier certifies that the eggs are sealed, as determined by inspection at destination, at the time of importation.

(c) Processed eggs purchased for export to other countries are inspected at the origin. The supplier at destination at a grade not lower than S.M. is required to furnish a health inspection at destination.

only one of the specified basins are used. Rather, each supplier will be applicable to all of the specified basins.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause came on regularly for trial on March 6, 1951, before the Honorable James M. Carter, Judge presiding, sitting without a jury, Alfred D. Haines, and Schauer, Ryon & McMahon, by Alfred D. Haines and Robert W. McIntyre having appeared as attorneys for the plaintiff, and Ernest A. Tolin, United States Attorney, Clyde C. Downing and Robert K. Grean, Assistant U. S. Attorneys, by Robert K. Grean, Assistant U. S. Attorney, having appeared as attorneys for the defendants; and oral and documentary evidence was introduced on behalf of both the plaintiff and the defendant and received by the Court; and the Court having heard all of the testimony and having examined the documentary evidence offered by the parties, and the cause having been submitted for decision, and the Court being fully advised in the premises, hereby makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

The Court finds as follows:

I.

That this is a suit of a civil nature brought against the United [42] States of America, and jurisdiction of this Court is invoked under the provisions of Title 28, Section 1346(a)(2) U.S.C., and that this Court has jurisdiction to hear and determine the within matter.

II.

That at all times mentioned in the complaint the plaintiff, California Vegetable Growers, was and is a corporation duly organized, existing and authorized to do business under and by virtue of the laws of the State of California, and whose principal place of business is in the City of Santa Barbara and within the jurisdiction of this Honorable Court.

III.

That on or about December 13, 1946, a Civilian Marketing Specialist, Donald L. Nelson, of the Quartermaster Market Center of the United States War Department, at Guadalupe, California, requested bids for 1490 crates of U. S. Number 1 Grade Celery, for export, to be packed in a specified manner for shipment to Seattle, Washington, and to be subject to inspection for condition at such destination.

IV.

That plaintiff, by oral quotation, submitted a bid to furnish such celery at the price of \$2.30 per

erate, and the Quartermaster Market Center of the United States War Department accepted such bid.

V.

That the Quartermaster Market Center of the United States War Department, at Los Angeles, thereafter, and in the course of normal procedure, issued three War Department Purchase Orders, Form WD 18, signed by the contracting officer and designated as LOS A 8259, 8260, 8261, embodying the terms of said request, bid and acceptance, and that said purchase orders were transmitted to the plaintiff in the course of normal procedure by mail.

VI.

That Purchase Order Forms WD 18, and the terms thereof, were authorized for use by the Quartermaster Market Center in purchases such as this by 813.1317b of 10 C.F.R. 1944 Supp., as published in the Federal Register, and [43] as revised, and then codified in 10 C.F.R. 1945 Supp., 813.1317b, at page 1530.

VII.

That said purchase orders satisfied the requirement of paragraph 303 of Procurement Regulation No. 3 (10 C.F.R. 1944 Supp. §803.303) that such purchase transaction be evidenced by a written contract.

VIII.

That said written contracts embody the entire agreement of the parties hereto.

IX.

That the terms of said contracts provided for "Inspection and Acceptance at Destination."

X.

That the "destination" under the terms of said contracts was Seattle, Washington.

XI.

That "U. S. Standards For Celery" (effective August 15, 1946) was published by the United States Department of Agriculture, printed in the Federal Register, and provided the standards by which inspections were made by Federal-State Inspectors.

XII.

That said celery was shipped and arrived in Seattle, Washington, where it was inspected for condition by a Federal-State Inspector and found to be decayed beyond the tolerances permitted by "U. S. Standards for Celery." and not fit for export.

XIII.

That based upon the condition of said celery on inspection at destination, to wit, Seattle, Washington, the defendant rejected and refused to accept said celery and refused payment therefor. [44]

Conclusions of Law

The Court makes the following conclusions of law:

I.

That this is a suit of a civil nature brought against the United States of America and jurisdiction of

this Court is invoked under the provisions of Title 28, Section 1346 (a)(2) U.S.C., and that this Court has jurisdiction to hear and determine the within matter.

II.

That the purchase orders were the contracts and embodied the entire agreement between the plaintiff and the defendant.

III.

That the plaintiff failed in the due performance of said contracts.

IV.

That plaintiff may not recover the purchase price therein.

Wherefore, the Court finds for and in favor of the defendant herein and against the plaintiff, and that the defendant have judgment against the plaintiff for costs of suit incurred herein. Judgment is hereby ordered to be entered accordingly.

Dated: April 2, 1951.

/s/ JAMES M. CARTER,

United States District Judge.

Approved as to Form:

ALFRED D. HAINES, and
SCHAUER, RYON &
McMAHON,

By
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 3, 1951. [45]

In the United States District Court in and for the
Southern District of California, Central Division

No. 11423-C Civil

CALIFORNIA VEGETABLE GROWERS, a
Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on March 6, 1951, before the Honorable James M. Carter, Judge, presiding; the plaintiff appeared by Alfred D. Haines, Schauer, Ryon & McMahon, by Alfred D. Haines and Robert W. McIntyre, its attorneys, and the defendant appeared by Ernest A. Tolin, United States Attorney, Clyde C. Downing, Robert K. Grean, Assistant U. S. Attorneys, by Robert K. Grean, Assistant U. S. Attorney, its attorneys; and said cause was tried before the Court sitting without a jury; and evidence both oral and documentary having been admitted, and the cause having been argued by counsel and submitted to the Court for decision, and the Court, after due deliberation, having filed its Findings of Fact and Conclusions of Law in writing, and ordered that Judgment be entered herein in accordance herewith in favor of the defendant and against the plaintiff;

Now, Therefore, by reason of the law and findings,

as aforesaid, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff, California Vegetable Growers, a corporation, take nothing by this action, and that the [47] defendant, United States of America, do have and recover of and from the plaintiff the sum of \$20.00, its costs incurred in this action.

Dated: April 2, 1951.

/s/ JAMES M. CARTER,
United States District Judge.

Approved as to Form:

ALFRED D. HAINES, and
SCHAUER, RYON &
McMAHON,

By,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

Judgment entered April 3, 1951.

[Endorsed]: Filed April 3, 1951. [48]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named plaintiff, California Vegetable Growers, a corporation, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, made and entered in this action on the 3rd day of April, 1951, and entered in Judgment Book No. 71 at page 686 thereof. This appeal is being taken from the whole of said Judgment.

Dated: April 24, 1951.

SCHAUER, RYON &
McMAHON,

ALFRED D. HAINES,

ROBERT W. McINTYRE,

By /s/ ROBERT W. McINTYRE.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 26, 1951. [50]

In the United States District Court, Southern
District of California, Central Division

No. 11423-C Civil

Honorable James M. Carter, Judge, Presiding.

CALIFORNIA VEGETABLE GROWERS, a
Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Tuesday, March 6, 1951

Appearances:

For the Plaintiff:

SCHAUER, RYON & McMAHON, by
ALFRED D. HAINES, ESQ., and
ROBERT McINTYRE, ESQ.

For the Defendant:

ERNEST A. TOLIN,
United States Attorney, by
ROBERT K. GREAN,
Assistant United States Attorney.

(Other court matters.)

The Court: The Shingle case will start tomorrow morning at 10:00 o'clock, and we will take up the Vegetable Growers case now.

Mr. Grean: May it please the court, in this matter the stipulation on file calls for the purchase orders in this matter to be attached thereto. That was inadvertently overlooked. At this time I would request the court to attach them to the stipulation.

The Court: Do you have a copy for my file, too?

Mr. Grean: Yes.

The Court: The clerk will attach them to the stipulation of facts filed January 30, 1951.

I couldn't find them on my copy and I figured they were on the court's original.

Are these cited in your stipulation?

Mr. Haines: Yes, they are.

Mr. Grean: Yes.

The Court: I see in paragraph III it says: "On December 13, 1946, plaintiff submitted a bid to furnish such celery * * *"

Is that bid one of the documents?

Mr. Grean: Not as to the stipulation.

I do have copies of the bid and offering that may be [2*] entered on stipulation of counsel. That is, abstracts of the bid.

The Court: Where do you identify these documents? Down in paragraph IV you say a certificate of inspection is attached.

Mr. Grean: No, sir. Top of page 5 of the stipulation.

The Court: Those are the three you handed me now?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Grean: Yes.

The Court: In your stipulation you say in paragraph IV:

“A copy of Inspection Certificate 65049 covering such inspection is attached hereto as a part of this stipulation.”

Mr. Grean: That's right.

The Court: It is not a part of my copy.

Mr. Grean: It is a part——

The Court: Let me have the clerk's file.

These files that you give to the court aren't much good unless you have it complete.

Mr. Grean: I have additional copies if the court will bear with me to produce them.

The Court: The clerk has an idea. Let's take them out of the stipulation of facts.

Mr. Haines: Counsel referred to abstracts of the written bid and acceptance. We haven't copies of those. I think possibly they should be—— [3]

Mr. Grean: Would you like at this time to stipulate that those may be a part of the stipulation?

Mr. Haines: Let me inspect them first.

The Court: What is this?

Mr. Grean: Abstracts of the offering and bids received.

These will be presented.

On stipulation of counsel they may be made a part of the stipulation. They are not referred to therein, however they are identified as abstracts of offering and bids received.

The Clerk: You have given me three here.

Mr. Grean: That's right. Each one is for a different car lot.

The Clerk: This is one set of three different documents, is that correct?

Mr. Grean: That is correct.

The Court: Do you have another set for me of the inspection certificates that you say are attached?

Mr. Grean: Yes.

Mr. Haines: The only objection we have to this is that we can't read it. The copies are so poor that they are not legible.

The Court: Where is the original?

Mr. Grean: I have a copy of it under seal, if the court please. It might be a better copy. [4]

Mr. McIntyre: We might be able to go over this and identify some of the things that are on it.

Mr. Grean: Here are copies for the court of the inspection certificates, destination inspection, and reinspection.

The Court: What are these short documents?

Mr. Grean: Notice of arrival.

The Court: So we won't break up your stipulation that you have prepared with the copies attached, I am going to take these copies that you have indicated with "For the Court," and mark them as exhibits in this case.

I take it there is no objection to calling them Plaintiff's Exhibits?

Mr. McIntyre: There is no objection to calling them that. Either party's.

The Court: Inspection certificate No. 65049 will be Plaintiff's Exhibit 1. I am following the order

in which you have them in your stipulation. Inspection certificate No. 65048 will be Plaintiff's Exhibit 2 in evidence. Inspection certificate No. 65025 will be Plaintiff's Exhibit 3.

PLAINTIFF'S EXHIBITS Nos. 1, 2 and 3

[Plaintiff's Exhibits Nos. 1, 2, and 3 are identical to Certificates attached to the Stipulation of Facts. See pages 20 to 22 of this printed record.]

Admitted March 6, 1951.

Form No. 53-1-PFE, Request for Confirmation, that form without a file number and having only in the right hand corner "Guadalupe, California," will be Plaintiff's Exhibit 4.

Mr. Grean: It does have a car number, your Honor.

The Court: Referring to car number RD-3086. Is that right?

Mr. Grean: Yes. [5]

The Clerk: Yes.

The Court: A similar Request for Confirmation having file No. G-5039, Guadalupe, 12-26-46, referring to apparently car PFE 41017, will be Plaintiff's Exhibit 5.

And the Request for Confirmation, file G-5023, Guadalupe, 12-26-46, referring to car PFE 45854 will be Plaintiff's Exhibit 6.

Inspection certificate D-43196——

Mr. Grean: That is a defendant's exhibit.

The Court: That is a defendant's exhibit?

Mr. Grean: Yes. The defendant will use it as one of its exhibits.

The Court: That will be Defendant's Exhibit A.

No. B-46844—that is the plaintiff's exhibit?

Mr. Grean: This is also a defendant's exhibit. Those are all inspection certificates upon which the defendant relies for rejection.

The Court: That will be Defendant's B.

Inspection certificate No. D-43195 will be Defendant's C, and Inspection certificate B-46845 will be Defendant's E—is that right, Mr. Clerk?

The Clerk: D, your Honor.

DEFENDANT'S EXHIBIT D

[Defendant's Exhibit D is identical to Certificate B-46845 attached to the Stipulation of Facts. See page 28 of this printed record.]

Admitted March 6, 1951.

Mr. Grean: That may be considered by plaintiff as their exhibit. However, it makes no difference to the case.

The Court: All right. [6]

Inspection certificate No. D-43243 will be Defendant's Exhibit E, and inspection certificate No. B-46839 will be Defendant's Exhibit F. And the three typed War Department purchase orders, is there any preference in the order of them?

DEFENDANT'S EXHIBITS E AND F

[Defendant's Exhibits E and F are identical to Certificate Nos. D-43243 and B-46839 attached to the Stipulation of Facts. See pages 29 and 30 of this printed record.]

Mr. Grean: No preference, your Honor.

The Court: Order No. LOS A 8259 will be Defendant's Exhibit—is this a defendant's exhibit?

Mr. Grean: A plaintiff's exhibit. A defendant's exhibit, I beg your pardon.

The Court: Defendant's Exhibit G. And order No. LOS A 8260 will be Defendant's Exhibit H. Order No. LOS A 8261 will be Defendant's Exhibit I.

DEFENDANT'S EXHIBITS G, H AND I

[Defendant's Exhibits G, H and I are identical to Orders attached to the Stipulation of Facts. See pages 31 to 36 of this printed record.)

Admitted March 6, 1951.

Mr. McIntyre: Those last are the memorandums of the abstracts of the bid, I take it? You have LAPO No. 8260 on these.

The Court: That identifies all the exhibits which are referred to in the stipulation.

In addition thereto counsel have stipulated concerning some summary sheets, concerning bids offered, to which some comment has been directed

that they are illegible. Do we have the originals of them?

Mr. Grean: I do not have the originals, your Honor. I do have some under seal that might be——

The Court: Let me see what you have under seal to see if [7] they are more readable.

Mr. Haines: Do I understand, counsel, that these are abstracts of the oral bid and acceptance written up in the office of the quartermaster?

Mr. Grean: Yes.

Mr. Haines: They are not actually a written offer or a written acceptance?

Mr. Grean: That is correct.

Mr. Haines: They are simply an abstract from the records of the quartersmaster's department?

Mr. Grean: That is correct.

The Court: The record will show that the exhibits heretofore identified are all in evidence by stipulation?

Mr. Haines: That is correct.

The Court: For the purpose of the motion and the trial both.

(The documents referred to were marked Plaintiff's Exhibits 1, 2, 3, 4, 5, and 6, respectively, and Defendant's Exhibits A, B, C, D, E, F, G, H, and I, respectively, and were received in evidence.)

The Court: These are a lot more legible. What kind of document is this—War Department? What kind of seal is it? They are records of the Army.

Is there any of the small type involved here that you are interested in?

As I understand this procedure of making an abstract of [8] bids offered, the quartermaster's office, when bids have been asked for, at the appointed time opens the bids and he has a form there in which he writes down a sort of summary of what bids were offered, and in this particular case apparently on lot or order No. 8261 there were two bids, on order No. 8259 there was only one bid, and on order No. 8260 there were two bids. Other people didn't bid. So I don't see that there is very much probative value in these things.

Mr. Haines: There are one or two matters there which might be very important in reference to the terms of the agreement, and the copies that counsel furnished us were in such shape that I couldn't make out what it was. I refer specifically to the Abstract of Offering.

The Court: Which order number?

Mr. Haines: This one here seems to be fairly legible. It is 3772, LA Lot No. 3772, Lot No. 1194, Car No. PFE 45854. I assume that these are identical in connection with all three carloads?

Mr. Grean: Yes. With the exception of the purchase order numbers to which they refer, and perhaps the number of bids received.

Mr. Haines: As to reference to date, to the delivery, and with reference to inspection points they are identical?

Mr. Grean: They are all identical, yes. [9]

Mr. Haines: With that understanding this one

copy that we have with reference to one car would suffice.

The Court: Which one are you talking about now?

Mr. Haines: I am referring to the Abstract of Offering with reference to car 45854. The LA lot number is 3772. It is Purchase Order 8261.

The Court: Yes. Well, that is fairly legible.

Mr. Haines: Yes.

The Court: A document of two pages, photostats of an original, page 1 entitled Abstract of Offering, and page 2, Bids Received, referring to LA lot number 3772, car number PFE 45854, and also referring to a number 8261, in connection with LA lot number 3772, will be marked in evidence as—whose exhibit?

Mr. Grean: Defendant's Exhibit, your Honor.

The Court: Defendant's Exhibit J, and by stipulation received in evidence.

(The document referred to was marked Defendant's Exhibit J, and was received in evidence.)

The Court: Are the check marks identical?

Mr. Grean: They are identical on all three copies.

The Court: I will also receive in evidence as Defendant's K the Abstract of Offering and Bids Received with reference to car SFRD, it looks like 3086, LA Lot No. 3770, also referring to LAPO No. 8259. [10]

(The document referred to was marked Defendant's Exhibit K, and was received in evidence.)

Mr. Grean: If the court please, the easiest way to identify the document is by the PO number, because they are then tied in with the purchase order number, 8259, that is legible on all copies, 8261 and 8260.

The Court: And LAPO 8260, LA Lot No. 3771, which involves car No. PFE 41017, as Defendant's L. With the understanding that if there is any of this material, parts of these exhibits J, K and L that we can't read, the burden will be on the defendant to take out of this Army file or have photostated out of the Army file a more legible copy and insert it. However, I think we can understand those things we have to understand from the copies we have.

Do you want to proceed?

Mr. Grean: By introduction to this motion for summary judgment, if the court please, attention is called to the plaintiff's complaint on file herein, wherein it is alleged an oral agreement on or about the 13th day of December, the amount to be paid, that the oral agreement took place at Guadalupe, California, that in accordance with said oral agreement celery was packed and shipped by plaintiff to Seattle after it was first inspected, it was wrapped and packed in a manner unacceptable in commercial channels, but in compliance with the request or agreement, that there were [11] commercial bills of lading which were to be converted at destination to

government bills of lading, that the celery arrived at Seattle, but that the defendant did refuse to pay the agreed purchase price upon the grounds that said celery did not pass inspection at destination.

It is further alleged, by reason of the non-commercial wrap and pack, the amount that plaintiff was only able to recover, and that prior to the filing of this complaint they had exhausted all their remedies.

If the court will please note, there is no allegation to the effect anywhere in the complaint that the said celery was wrongfully refused, that there was no right of inspection, or that the plaintiff had in any way complied with all of the terms and conditions of its contract.

Now, I am just calling that to the court's attention in passing because it bears slightly on the basis of the summary judgment which is taken at this time rather than a motion for judgment on the pleadings.

In view of the stipulation of facts and the complaint and the exhibits attached thereto, plaintiff attempts to allege an oral contract with an agent of the government who has no authority to contract, to terms contrary to those which an authorized contracting officer could make, all for the purpose of avoiding their agreed duty to permit inspection at destination. [12]

As to the first count, a contract of the type upon which plaintiff bases its suit could only bind the government if in writing in accordance with the laws and regulations thereunder.

The applicable statute is that which appears, if the court please, in Title 5, U.S.C.A., Paragraph 219.

That provides that contracts in excess of \$500 not to be performed within 60 days shall be reduced to writing and signed by the contracting parties, and in all other cases contracts shall be entered into under such regulations as may be prescribed by the Secretary of War.

What did the Secretary of War prescribe in this case?

Since the contract in suit, whether an oral understanding or the agreement alleged by the written purchase orders, is not specifically covered by this statute, it becomes necessary to look to the regulation, and that particular regulation is paragraph 303 of Procurement Regulation No. 3, which may be found in 10 Code of Federal Regulations, 1944 Supp., Paragraph 803.03. It was issued by the Secretary of War and was in effect at the time. And this provided under the heading "General Requirements for Contracts":

"Every purchase transaction except those where payment is made coincidentally with receipt of supplies will be evidenced by a written contract." [13]

The purchase order form unilaterally signed by the contracting officer was authorized by subparagraph 303.4 under the heading "Purchase Orders" when used, and it states that if the contractor's assent is not evidenced either by a written quota-

tion or by acceptance of the purchase order in writing, the purchase order may nevertheless be used for any purchase transaction the contract price of which is less than \$100,000 provided that the purchase order is preceded by an oral quotation.

The Court: Now, let me get that again.

That is what you have set forth in paragraph III of your memorandum, isn't it?

Mr. Grean: Yes. Shall I proceed?

The Court: Yes; but you have only quoted part of it and you have read more of it. Will you read again what you read from that regulation?

Mr. Grean: If the "contractor's assent is not evidenced" and this is a quotation from the section which pertains to this particular method used in this matter—"either by a written quotation or by acceptance of the purchase order in writing"—

The Court: Stop right there. Isn't the assent here evidenced by a written quotation?

Mr. Grean: No, it is not.

The Court: Didn't they make a written bid? [14]

Mr. Grean: No, it is not. It was an oral bid.

The Court: It was an oral bid, which was entered on this summary of bids?

Mr. Grean: That is correct. All the bids thereon were oral.

The Court: All right.

Mr. Grean: In fact, if you refer to the face page of the purchase order—

The Court: The purchase order was in writing, but there was no written acceptance of the purchase order?

Mr. Grean: That is correct. And there is none required by law. In other words, this method of operation is one that was set up during the war by regulations of the Secretary of War, printed in the Federal Register.

The Court: Pardon me for interrupting. Now, read that paragraph where it says the "contractor's assent"——

Mr. Grean: "The purchase order may nevertheless be used for any purchase transaction the contract price of which is less than \$100,000, provided that the purchase order is preceded by an oral quotation." And there is more to the paragraph which I feel is not pertinent to this situation.

The Court: "is preceded by an oral quotation"?

Mr. Grean: That is correct.

The Court: Is that what happened in this case, the oral quotation was made first and then the purchase order was [15] issued?

Mr. Grean: That is correct, and that is quite common procedure. In fact, the face page of your purchase order states: "Pursuant to an oral quotation."

In other words, if the court please, we have the law requiring that the contract be in writing; second, the law authorizing the method by which such a purchase may be made. In fact, going so far as to set out the actual War Department form No. 18 in the Federal Register with instructions for its use.

The Court: I don't follow you on that.

Does the purchase order set out this matter you refer to as form 18?

Mr. Grean: It does, your Honor.

The Court: See, I didn't see these until this morning, I haven't seen these purchase orders. Which is the form 18 that you talk about?

Mr. Grean: At the bottom left-hand corner of the purchase order, printed thereon.

The Court: I see. War Department form 18. And that has something on the reverse of it?

Mr. Grean: Yes.

The Court: Revised, according to your memorandum, November 11, 1944, and was set out in toto in the Federal Register and then codified in 10 Code of Federal Regulations. [16]

"The general provisions required to be contained on the reverse side" of the form.

You say "required to be contained"; does the regulation require——

Mr. Grean: The regulation sets out the language exactly that is to be used on the reverse side of the form.

The Court: Including this one on inspection, paragraph 2?

Mr. Grean: Yes.

The Court: Now, where does "inspection" appear on the back in all the small print? No. 4?

Mr. Grean: No. 4.

The Court: I am either going blind or—I can't read that.

Here is one I can read. Here is one a little more legible.

All right.

Mr. Grean: The court's attention is also called to the inspection provision on the second continuation sheet, Special Conditions paragraph 1.

The Court: Is this something extra or is that something required by regulation or statute?

Mr. Grean: That is something extra which has been added over a long period of time by departmental regulation. And, of course, the departmental regulations properly adapted to [17] enforcement of the statute have the force of law, according to *United States v. Christensen*, a case in 1943. It is settled by many recent decisions of this court that a regulation by a department of the government addressed to and reasonably adapted to the enforcement of an Act of Congress, the administration of which is confined to such department, has the force and effect of law if it not be in conflict with the express statutory provision.

The Court: Let me see first what it contained in this continuation sheet, or can you tell me in a few words, under Inspection?

Mr. Grean: Yes, if the court please. The continuation sheet provides for inspection for quality, counts, at point of origin.

The Court: Point of origin?

Mr. Grean: Right. It provides, further, for inspection for condition and quantity at point of destination, and provides for all conditions inspection privileges at destination where such inspection has not taken place at the point of origin, which is not the contention in this case.

The Court: Form 18, Exhibits G, H and I, has "Methods of presenting invoices or vouchers," and so forth, "on commercial bill of lading to be converted to government bill of lading at destination."

Is there a dispute as to what that means? [18]

Mr. Grean: Apparently additional significance is being attached to that particular method by the plaintiff in their various memoranda in the matter.

The Court: I can understand why the government would want a government bill of lading on these land grant railroads, because they got a cheaper rate, but it says "commercial bill of lading to be converted to government bill of lading at destination." Does that mean at destination, which was Seattle, it was first to be picked up on a government bill of lading? Up to that time it was on a commercial bill of lading?

Mr. Grean: No. That means that the commercial bill itself is converted to a government bill for the sake of expediency at Seattle.

The Court: Converted back over the period of transit from Guadalupe to Seattle?

Mr. Grean: Yes.

The Court: Is that what is meant, do you both agree to that?

Mr. Haines: No, your Honor. My understanding of it is that in order for the government to take advantage of the land grant rates title had to pass to the government at point of shipment. That is why they used the commercial bill of lading from Lompoc, which was the shipping point, to Seattle, but with the provision that it be converted to government [19] bill of lading at that point.

The Court: By conversion you mean going back and taking the commercial bill of lading that covered the goods from Guadalupe to Seattle and convert it to government bill of lading covering that same period of transit?

Mr. Haines: That's right.

The Court: We are in agreement, then, as to what that means.

Mr. Grean: However, if the court will accept Defendant's statement, which we think will be proved, the fact that the necessity of title passing at point of—F.O.B. in the usual commercial connotation is not indicated by this transaction by use of a commercial bill of lading.

The Court: I am noticing, also, here "Schedule of deliveries, 23 December, 1946," again referring to what exhibit, Mr. Clerk?

The Clerk: They are G, H, and I, your Honor.

The Court: "Schedule of deliveries," referring to Exhibit H, "23 December, 1946, Inspection Points—Inspection and acceptance at Destination."

Mr. Grean: That is correct.

The Court: Is there any dispute about what that means?

Mr. Haines: Yes, considerable.

The Court: All right. Go ahead, Mr. Grean.

Mr. Grean: In view of the allegation of plaintiff's [20] complaint, faulty, though it may be, "That said sale and delivery"—paragraph V on page 2—"of said celery was made in accordance with an oral understanding and agreement arrived at by and between plaintiff and defendant at Guada-

lupe, California," it is pointed out that the civilian field representative has no authority to contract.

His status is quite well defined in Supply Bulletin issued by the Secretary of War, No. 10-117, subparagraph 9(c).

Would the court like to follow that in the bulletin itself?

The Court: Yes, if you have an extra copy I will look at it.

Describe what you are reading from so counsel will know.

Mr. Grean: I believe I have described the following paragraph in Supply Bulletin No. 10-117, subparagraph 9.

The Court: Status of market centers, is that right?

Mr. Grean: Refer to 9(c), if the court please.

The Court: 9 says, "Status of market centers," and then it has (a), (b), (c), and you want to read from what—(c)?

Mr. Grean: Yes.

"Co-ordination of duties between purchasing and contracting officers and marketing specialists. In order for market center offices to operate efficiently, there must be close [21] co-operation between the purchasing and contracting officers and marketing specialists. The marketing specialist should have more knowledge relative to the actual selection, inspection, and buying of perishable commodities, hence will do most of the work of this nature. How-

ever, this does not relieve the purchasing and contracting officer of being prepared to assume these functions at any time. Likewise, the marketing specialist should be in a position to assume all duties that normally are performed by the purchasing and contracting officer, except signing procurement instruments."

The Court: Do you think that adds very much?

Mr. Grean: I believe that it lends further weight to the fact that the civilian field representative to whom they refer had no authority to contract.

The Court: What was he, a marketing specialist?

Mr. Grean: A marketing specialist.

The Court: That doesn't appear by any stipulation, any affidavit, any document in this record, does it?

Mr. Grean: He is referred to in the complaint as "defendant at Guadalupe, California."

The Court: With that we wouldn't know who was at [22] Guadalupe, California. It might have been a General, Private, or Marketing Specialist, as far as the allegations of the complaint are concerned.

Mr. Grean: That will be proven at the trial.

The Court: I am addressing my remark now to the fact that we are arguing a motion for summary judgment.

Mr. Grean: I see your point.

The Court: Whether that is material on a motion for summary judgment, or not, I don't know,

but certainly there is nothing before me to show who this man was at Guadalupe. The complaint merely alleges they orally contracted with the defendant at Guadalupe.

Mr. Grean: Well, let's look to the stipulation of facts.

The Court: "Quartermaster Market Center," is all it says, accepted the bid. Paragraph III.

Mr. Grean: For the sake of brevity, will the court accept an affidavit, and will counsel stipulate to an affidavit indicating that the field representative referred to, one Donald Nelson, was the government's representative at Guadalupe?

Mr. Haines: Yes, we will so stipulated, your Honor.

The Court: You stipulate that the government's representative at Guadalupe was Donald Nelson?

Mr. Haines: That's right. [23]

The Court: And that he is the man that you orally contracted with?

Mr. Haines: Yes.

We can't stipulate to what his exact functions are, because that is not within our knowledge, whether he was a field representative or a specialist, or one of a thousand titles that in these thousands of regulations he might be called, we have no way of telling. It is knowledge particularly within the defendant.

The Court: Pardon me just a minute. I will give the reporter a rest, so we will take a recess at this time.

(A recess was taken.)

Mr. Grean: In furtherance of the contention as to the marketing specialist, by stipulation of counsel, this affidavit is presented.

Mr. Haines: For the sake of clarity, counsel, I understand that your contention is that Mr. Nelson was a marketing specialist, and I am stipulating to that. Further, that as a marketing specialist he had full power to negotiate the contract, but he couldn't sign the actual written evidence of the contract.

Mr. Grean: Couldn't execute the contract.

Mr. Haines: He could do everything up to the signing of the contract?

Mr. Grean: Exactly. [24]

Mr. Haines: That was his purpose and function?

Mr. Grean: Yes.

The Court: That is so stipulated, is it?

Mr. Grean: And that Donald Nelson was the marketing specialist with whom you made the alleged oral agreement?

Mr. Haines: That's right.

The Court: That is so stipulated, is it?

Mr. Haines: It is.

Mr. Grean: It is.

The Court: This affidavit of Wyman H. Montavan will be made Defendant's Exhibit M, received by stipulation, is that correct?

Mr. Haines: Yes, your Honor.

(The document referred to was marked Defendant's Exhibit M, and was received in evidence.)

The Court: In case the record doesn't show it, all these exhibits that we have identified heretofore are in evidence by stipulation.

All right. Proceed.

Mr. Grean: To summarize, then, so far, we have shown that the law requires a contract to be in writing; second, that the unilateral purchase order form used in this matter in this case was the one prescribed by law; third, that the conditions contained thereon in the printed portions were those published in the Federal Register as a requirement to [25] the back of said War Department Purchase Order No. 18; fourth, that the Marketing Specialist could negotiate a contract but could not execute one.

Now, let's look to the legal limitations imposed upon the contracting officer, with regard to the terms and conditions to which he could bind the government in a transaction such as this.

You see, plaintiff has attempted by alleging an oral contract throughout this situation to avoid an inspection at destination, provisions of the written purchase orders, which would result in barring their recovery.

The purchase in issue was made pursuant to the authority granted to the Quartermaster Market Center System by the Secretary of War through the Supply Bulletin which you have up there, if the court please, No. 10-117, the little black booklet.

The Court: Yes.

Mr. Grean: Subparagraph 8(a) of said Supply Bulletin provides for purchasing items of perishable subsistence F.O.B. origin or destination as will best

serve the interests of the government. However, section 20a provides:

“Inspection may be accomplished at point of shipment or at destination, whichever is more feasible. Inspection at origin is encouraged in order to decrease the number of rejections [26] at destination. However, final acceptance and possession by the government is contingent upon inspection for quantity, soundness, and condition at destination.”

You will note that inspection at origin is encouraged in order to decrease the number of rejections at destination, presuming if merchandise or produce at origin passed inspection, the chances are that the condition would be proper at the destination.

Subparagraph 20b(4):

“Carlot inspection. Market centers will also encourage contractors supplying carlot shipments of fresh fruits and vegetables”——

Quoting in part:

“to furnish a Federal certificate as evidence that the commodity meets the grade requirements under which purchased. * * * Final inspection for condition and count will be made at destination.”

The Quartermaster Market Center is therefore operated by authority and under the limitations of the above-quoted sections—I believe that particular bulletin is signed by George C. Marshall, as an instruction and a limitation—hence it is obvious that

any contract which the contracting officer had authority to make required the inclusion of the [27] inspection at destination conditions.

Those were the limitations on his operations.

It is well settled that the government could be bound only by the acts of its authorized agents. There is a lot of law on that. I don't know whether the court feels it is necessary that I take the court's time, however, I will point out one case, *Whiteside v. U. S.*, 93 U. S. 247, in which the court states at page 256:

“Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the *court* of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, * * *”

The Court: I am familiar with that rule.

I think one of the outstanding examples of that rule is the West Point case on condemnation, where the government was condemning the water supply of the town of West Point, and [28] some Army officer assured the town that if the condemnation went through they wouldn't have to worry about

their water supply, they would have plenty of water, as long as they wanted it. It turned out that, I think, Congress had to subsequently enact a law to give West Point back its water supply.

The government was not bound by the statement made by their officer.

Mr. Grean: Let's carry it a step further. Let's assume that the contracting officer could ratify, he could ratify a contract made by his assistant, the Marketing Specialist. It must nevertheless be understood that their power in that behalf was restricted to the ratification of such contracts as they themselves—this is in the Whiteside case—were empowered to make. [29]

In other words, if the contract in itself did not make a contract, they abrogated the provisions of that supply bulletin with regard to the procurement of perishable vegetables.

The Court: I have your point.

Mr. Grean: Apparently it will be clear that, even assuming now that this had been reduced to writing with the inspection at destination provision omitted, the transaction would be subject to that provision anyway, or there would not have been any contract in this purchase at all.

The cases are manifestly manifold in support of the statement that such an agreement, where required by statute, must be evidenced by writing. I have quoted such cases in my memorandum, and I don't feel it necessary to go through the statements of those cases at this time.

Just one point as to the present invoice being

governed by federal law. I notice by the trial memorandum as submitted by plaintiff that he places various California code sections into the record, and also cites various cases which are based on California law. The manner of purchase in such a case is governed by the specific federal statute. Judge Yankwich in *United States v. Jones* recently ruled on that. It is a 1949 case, and he quotes from *U. S. v. Allegheny County*, wherein he states:

“Every acquisition, holding, or disposition of [30] property by the federal Government depends upon proper exercise of a constitutional grant of power. * * * The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.”

The Court: Let me have that citation again.

Mr. Grean: That is *U. S. v. Jones*, 176 Fed. 2d, 278 (1949).

The Court: Was Judge Yankwich sitting on the Circuit at that time?

Mr. Grean: Yes. That is at page 281, and he quotes from *U. S. v. Allegheny County*, which is a leading case on the point, 322 U. S. 174, a 1944 case.

The Court: These district judges do get around.

Mr. Grean: In the *Allegheny* case, at page 182, the court states:

“The Constitution provides that ‘The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.’ * * * [31] It also gives Congress the power ‘to make all Laws which shall be necessary and proper for carrying into Execution’ all powers vested in the Government or in any department or officer thereof * * *, and it makes the laws of the United States enacted pursuant thereto ‘the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ ”

The Court: Go ahead.

Mr. Grean: In the light of the foregoing, then, it would appear that if the plaintiff relies upon an oral agreement, which the law states must be in writing, such contract must fail. If, however, he submits to the only contract in the case, which is set out in the purchase order which was made within the limits of the authority and in the manner and form required by law, then he must be bound by the inspection provisions therein required and having been bound thereby, the inspection certificates in this case bear out the fact that inspection on condition revealed just cause for rejecting this as not being fit for export.

The word “export” is not new in this matter. It appears throughout the stipulations, and it appears throughout the [32] various pleadings in this matter.

Now, this was not a commercial wrapping, but especially wrapped for export. There was an implied warranty that it would meet that situation.

The Court: May I have the exhibits, Mr. Clerk?

The Clerk: Yes.

Mr. Grean: Now, mind you, the distinction which must be made is one as between quality and condition. Inspection for quality at point of origin, requiring a specific grade. Inspection for condition at destination. This celery was purchased for export.

The Court: Where does that appear? In what? Do you contend that "H" shows that? For instance, "H" is a contract. Where does it appear "for export"?

Mr. Grean: In the purchase order?

The Court: Yes.

Mr. Grean: On the face thereof:

"Each stalk to be individually wrapped in parchment paper; wrapper to cover complete shank of stalk. Crate to be wired, strapped at each end for Export."

The Court: For export.

Mr. Grean: "Marked: LADD-QMI-A56," which is the code to the quartermaster, and which is the destination it would ultimately have reached. [33]

LADD-QMI-A56.

The Court: The one I am looking at has "NOME." But that wouldn't be Nome, would it? That is probably just some code. It is on "H."

Mr. Grean: Now, from an inspection at point of origin showing no decay to an inspection at Seattle,

Washington, wherein it shows in the first car blight ranges from 4 to 17% in many crates, averages 6%. Decay irregular most crates ranges from 5 to 20%, averaging approximately 7%.

The Court: What are you reading from?

Mr. Grean: The inspection certificate.

The Court: Which car?

The Witness: No. 43243, covering car LA-8261.

Mr. Haines: Exhibit E, your Honor.

Mr. Grean: Now, of course, on the standards employed, I call the court's attention to a paragraph in the Supply Manual. May I have the Supply Manual?

Mr. Haines: Is it the contention of counsel that the Supply Manual is binding upon all parties, or is it a regulation or merely a directive to the governmental officers in the performance of their functions? I do not think we can indulge in the idea, your Honor, that each and every regulation and Supply Manual and bulletin directive to the governmental agency in question is the law of the land. I think there must be some pinning down of it to show that it is not [34] merely an intermural situation, in which the War Department is directing its agents as to how they want their records kept, and how they want them to conduct their business.

The Court: Was this particular manual ever published in the Federal Register?

Mr. Grean: The particular manual was not. However, portions of it, and have been referred to at times, that is, the War Department 14. That is the contract and the inspection provision.

Now, let's assume, however, for the sake of this discussion that this was a limitation upon the authority of the contracting officer.

Mr. Haines: I don't know how you can assume that, counsel. It may be a mere directive.

Mr. Grean: If you would prefer to assume it is also binding on you——

Mr. Haines: No, I don't assume that, and I can't assume it.

The Court: What is your point? You are assuming for argument that it is binding only on the contracting officer. What is your point?

Mr. Grean: That is a limitation of his authority. In other words, confining his activity in entering into an agreement, that it must be within these limitations. These were portions that were published in the Federal Register. [35] Other portions were not. What I am calling the court's attention to now are specifications.

Another point which will appear, if counsel wishes to argue this point now—it will appear from the cases that the court may take judicial notice of the fact that California Vegetable Growers did not come into the picture for one transaction on celery. They are in the business of dealing in produce, just as the Quartermaster was in the business of purchasing produce. This isn't the only transaction that was ever entered into, and the court may take judicial notice of the fact, not from what appears in the case, but from the status of the company involved.

The Court: Take judicial notice of what?

Mr. Grean: Of the fact that they are in the

business and were in the business at that time of selling produce, and that they, as well as everyone else, were aware of the conditions under which the Quartermaster did buy and could buy.

Mr. Haines: That is assuming an awful lot.

Mr. Grean: You can expect that John Smith, who has a potato patch out in the country, would know nothing about this perishable substance.

Now, these happen to be United States inspections. You will note from the face of them that they are prima facie evidence, by statute made prima facie evidence in courts of [36] Washington and the United States, but which does not relieve the holder from compliance with regulatory laws, evidence of the inspection, and the terms therein.

The United States Department of Agriculture, United States Standards for Celery, effective August 15, 1946——

The Court: From what are you reading now?

Mr. Grean: United States Department of Agriculture, Production and Marketing Administration, U. S. Standards for Celery, effective August 15, 1946.

Mr. Haines: I don't see that this has anything to do with this motion, your Honor. It is not in evidence.

Mr. Grean: The United States Standard for Celery is——

The Court: Well, you say "Standard." What is this published in? In a bulletin or in an administrative order? What is this Standard for Celery that you are reading from?

Mr. Grean: These are the standards upon which the inspection was made; these very inspection slips which you have on your desk.

The Court: These inspection slips refer to these standards you are referring to?

Mr. Grean: United States Department of Agriculture and the Washington State Department of Agriculture. These are forms that are used by the United States Department of Agriculture, and in order to judge what the basis of the particular inspection certificate is, it is necessary to refer to [37] the United States Department of Agriculture standards.

The Court: In other words, you are going down now to where they come to the conclusion, for instance, on Exhibit F, "Grade: Now fails to grade U. S. No. 1 Green only account decay, but now contains approximately 70% U. S. No. 1 Green quality; 25% decay."

Mr. Grean: That is correct.

The Court: Now, since this is made by an official of the Department of Agriculture, you are now referring to the Standards of the Department of Agriculture to interpret this conclusion?

Mr. Grean: That is correct, your Honor.

The Court: How are these standards published by the Department of Agriculture? Do you have a bulletin or a document of some kind there?

Mr. Grean: Yes, I do.

The Court: What does it say? What is its title?

Mr. Grean: The title is, "United States Depart-

ment of Agriculture Production and Marketing Administration, U. S. Standards for Celery (Effective August 15, 1946).” It is signed “Issued August 8, 1946. Reissued August 9, 1948,” which is immaterial to this.

The Court: Signed by the director?

Mr. Grean: Signed by E. A. Meyer, Assistant Administrator, Production and Marketing Administration. [38]

The Court: Is this printed in the Federal Register?

Mr. Grean: Yes, it is.

The Court: All right. I am tentatively of the opinion it is a document the court would take judicial notice of.

Mr. Grean: The court must take judicial notice because this is the basis upon which these very inspection slips were arrived at, and quoting from that under the Standards for Celery, where it states, “U. S. No. 1,” it states that it “shall consist of stalks” and then it describes the various characteristics and the type. However, it states:

“In order to allow for variations, other than lengths, incident to proper grading and handling, not more than 10 per cent, by count, of the stalks in any lot may be below the requirements of this grade, but not more than two-fifths of this amount, or 4 per cent, shall be allowed for decay, provided that not more than one-half of this decay, or 2 per cent, may be in the branches or in an advanced stage in the roots.”

Now, as to this celery, as to quality there is no quarrel. It is like the purchase, if the court please, of Botany flannel and it comes to us as Botany flannel, but in transit it is torn, and it is of a condition which is not fit for the purpose it was [39] intended.

That is the situation with the celery, which was of a certain quality and might be the quality purchased, but the condition was not fit for export. This celery had gone just about one-fourth of the distance it had to go.

The Court: It is apparent now what those mean in those markings. Apparently one carload was for Ft. Richardson, one for Ladd Field, and the other one was for Nome. That is where they had to go. Go ahead.

Mr. Grean: There are further impelling reasons against permitting parties to a contract to base their causes of action on negotiations preceding written agreements rather than on the written agreements themselves. That is the reason the courts have persistently held that a written contract merges all previous negotiations and is presumed in law to express the final understanding of the parties. Now, more than ever, this doctrine has legal import in connection with Government contracting. Negotiation authority, under the Armed Services Procurement Act, has been employed by the Market Center System on a scale never before known in peace-time procurement. With the extension of negotiated purchasing to include all procurement by the military establishment, during the

present emergency declared by the President, the Government will require the protection of the well-established principles enunciated by our courts over the years, particularly since so much in negotiated buying [40] is of an oral character, which, if the rules were otherwise, would lead to a plethora of suits and claims against the Government if all negotiations preliminary to definitive contracts could be relied upon.

With regard to that I wish to quote from one case, which is *Clark v. United States*. It is a case involving an oral agreement. The court states at page 541:

“It is contended on the part of the Government”——

The Court: You did not give me the citation.

Mr. Grean: 95 U. S. 539 (1877):

“It is contended on the part of the Government that this Act is mandatory and binding, both on the officers making contracts”—in this case it was with the Secretary of War, and the Act referred to requires that they be reduced to writing—“and on the parties contracting with them; whilst the claimant insists that it is merely directory to the officers of the Government, and cannot affect the valdities of contracts actually made, though not in writing * * *

The arguments by which this view has been enforced by that court are of great weight and, in our judgment, conclusive. The facility with which the [41] Government may be pillaged by the presentment of claims of the most extradi-

nary character, if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the Government should be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves and prevent them from making reckless engagements for the Government; but the considerations referred to make it manifest that there is no claim of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part." [42]

The Court: You have very ably presented your motion, but I don't want to pass on it now without hearing from the other side. But what is the advantage from your standpoint of having this case decided on a motion for summary judgment rather than upon the facts?

Mr. Grean: The only advantage is this, if the court please: It would be conceivable that such a

summary judgment granted as of yesterday would render it unnecessary to require the attendance of witnesses. It would render it further advisable from the standpoint of narrowing the issues of the case, in the event the court decided that the only contract which could be used in this case would be the written contract and would require evidence on that.

The Court: Yes, I have in mind that portion of your motion, that is, for summary judgment, or for summary judgment as to certain issues and defining of the other issues in the case.

Mr. Haines: Counsel, might I inquire, in this "Abstract of Offering" what the initials NMC stand for,—the "Inspection Points Seattle Market Center or NMC"?

Mr. Grean: NMC means Navy Markets Center.

The Court: I will hear from the plaintiffs after lunch. How much time do you want before we get into the other parts of this case?

Mr. Haines: I would say 30 minutes, probably, your [43] Honor.

The Court: Very well. 1:30. Come back at 1:30. Is that satisfactory?

Mr. Haines: That will be fine.

(Whereupon at 12:00 o'clock noon a recess was taken until 1:30 o'clock p.m. of the same day.) [44]

Tuesday, March 6, 1951. 1:30 P.M.

Mr. Haines: Shall I proceed?

The Court: Yes. You are Mr. Haines, aren't you?

Mr. Haines: That is correct.

May it please the court: I believe that the defendant's position can be fairly summarized as follows: First, that the contract must be evidenced by a written instrument; second, that in this instance the purchase orders are unilaterally executed by the defendant; third, that because the orders contain the provision reading "Inspection and acceptance at destination," the defendant had the right to inspect the produce at Seattle, Washington, on the ground that it did not pass inspection for condition there; and, fourth, that because of the regulations cited by the defendant calling for an inspection at destination, the defendant would have had the right to inspect at Seattle even if the contract did not so provide. I believe that, in substance, is the contention of the government.

For the purposes of this motion, we will accept the first two propositions as being true, even though it rather affronts our sense of legal propriety that a contract can be created unilaterally, one party only signing that contract, and the instrument they claim to be the contract, even though that instrument is prepared entirely by one of the two [45] parties and is never presented to the other contracting party for its approval and is never executed by the other party.

However, for the purpose of this argument, we will accept that as being the law. In acceding to that position, however, we do not wish to be misunderstood on two points: first, that granted that a contract binding the government must be evidenced by a writing, we submit that said writing must accurately and correctly reflect the meeting of the minds of the parties. For instance, the defendant could not cut the agreed price in half and then say that is the contract and that is binding on contractor, and, otherwise, it is no contract at all.

Even though the government can create a contract by a unilateral instrument, I take it, it is fundamental that that instrument must accurately set forth the oral meeting of the minds with reference to the subject-matter of the agreement. Second, granting that the federal statutes and regulations must be complied with in creating the contract, nevertheless, when the contract is made, then and thereafter the construction of that contract and the rights and liabilities of the respective parties under the contract are subject to the general principles controlling the sale of personal property.

We do not have in this contry, your Honor, two separate sets of jurisprudence, one federal and one state. The [46] general principles of the law of sales and the law of contracts appertains to the government as well as it does to individuals, and where in our trial memorandum we have cited certain sections of the California Civil Code, we are nevertheless setting forth the controlling law, the principles of the law on the subject-matter of this

suit, in so far as the passage of title, the risk of loss, and the other pertinent factors are concerned.

After all, we have in this state the Uniform Sales Act, and the Uniform Sales Act has been held in various cases to be nothing more nor less than an announcement of the common law. So we say that the rule contended for by the government is subject to those limitations, and we accede to their contention with those reservations in mind.

I stated that once a contract is entered into, from that point on we must look to the general and accepted principles of the law of sales to interpret the contract and to construe the rights and liabilities of the parties.

There are a number of decisions in the United States Supreme Court on the subject. In *U. S. v. Utah Stage Co.*, 199 U. S. 414, the court held:

“* * * * * These same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the government and individuals.” [47]

And in *U. S. v. Standard Rice Co.*, 323 U. S. 106, the court held, generally, that the United States is a contracting party and is to be treated as other contractors under analogous situations, and its contracts are to be interpreted in accordance with the law of contracts.

Again, in *U. S. v. Purcell*, 249 U. S. 313, it was held that:

“the government should be animated by a

justice as anxious to consider the rights of the bidder as to insist upon its own."

However, for the purpose of this motion we are accepting the proposition that the contracts, as evidenced by the purchase orders, are valid. We now come to the real nub of the defendant's argument, as presented by the third and fourth propositions which I have related. Those two propositions must be treated akin, and they are as follows: first, do the purchase orders provide for inspection at destination; and, second, where was destination?

The orders carry the provision reading, "Acceptance and inspection at destination," and also include the provision, "Delivery F.O.B. origin." Thus, on their face there is an inconsistency and a conflict. As shown by the authorities in our trial memorandum, it is the universal rule that where goods are shipped F.O.B. origin or shipping point, title passes to the buyer at that point, and risk [48] of loss thereafter is on the purchaser.

There is a corollary to the above which provides that the buyer has a reasonable right of inspection before acceptance. Therefore, even though title passes, the buyer, if he has not inspected it at origin has the right to inspect thereafter.

There is an annotation on that subject, your Honor, in 27 A.L.R. at page 524, where numerous case are reviewed, at the conclusion of which the annotation remarks, citing authority: Of course, where the purchaser inspects at shipping point, then he has no right of inspection at destination.

and he must accept the goods at destination; and otherwise he is liable for damages for his refusal so to do.

The Court: Wouldn't that be in a case where there was no contract providing for an inspection at any particular place?

Mr. Haines: Those case usually come up, your Honor, where, say, A in New York wants a load of oranges from B in California, and he has no possibility of inspecting them. The courts say that the general rule of the passage of title applies; that if it is F.O.B. California, it prevails, but despite the fact that title does pass, the right of inspection at destination remains in the purchaser, because of the fact that he did not have the opportunity to inspect at origin. But, as I say, the opposite of that rule is that if [49] he does inspect at origin, then he waives his right of inspection at destination. Your Honor says that in the event the contract provided for destination inspection, that it might be contrary. Well, in reference to the case at bar, I think we will touch upon that later. But there are two things, I think, that should be borne in mind all through this discussion. First, that this purchase order was written up seven to nine days after the contract was completed, as far as the plaintiff was concerned.

The Court: Right at that stage, can we stipulate what is apparently a fact, that the purchase orders, Exhibits G, H, and I, were written up after the celery had been shipped?

Mr. Haines: That is correct.

Mr. Grean: That is correct, your Honor.

Mr. Haines: 7 to 9 days afterwards.

The Court: I don't know that the time is important, but that they were actually written up after the shipment.

Mr. Grean: I will stipulate to that, providing it is understood it was done in the usual course of procedure of the Quartermaster Corps in handling all such types of contracts.

Mr. Haines: I can't stipulate to that effect, because I have no knowledge.

The Court: You can put on proof to that effect when we get to that stage of the case. But it is a fact that they [50] were typed up after the celery had been shipped?

Mr. Grean: That is correct.

Mr. Haines: Also, they were typed up by the defendant alone, and were not even submitted to the plaintiff for approval, other than execution.

We claim that the rule that is discussed in this Annotation applies here, because the produce was inspected and accepted at origin, namely, Lompoc, by the defendant before the purchase orders were drawn up.

Furthermore, even if the buyer had a further right to inspect again at some further point, such inspection would, of necessity, be limited to determining condition and count as of the time the buyer took possession and title, and could not be used as a basis of rejection because of any defects which arose after the buyer was put in possession and

control of the goods, attributable to his handling of the goods.

Rivers Bros. Co., v. Putney, 119 Pac. 108; Mette & Kanne Distilling Co. v. Lowrey, 101 Pac. 966.

This rule, we submit, is particularly applicable here, where shown on the face of the orders that the entire handling of the goods and the inspection was dictated by the buyer, that is, wrapping, icing, and shipping of the produce F.O.B. origin, or, to put it another way from Lompoc. The complete control and possession of the produce, as well as the title to [51] it, was in the defendant. What happened to it from that time on, we do not know. We do not know whether at some place along the line the doors of the car were left open for an unseasonable length of time. We do not know whether it was properly iced en route. We do not know a number of other things which might have happened to cause its condition.

We were responsible for the quality and condition of the celery up to the point that it was put on the car at shipping point. From that point on it was the problem of the defendant. Therefore, the defendant had a right to inspect at any further point, and that inspection, so far as we are concerned, must be limited to checking upon what the condition of the goods was when shipped at Lompoc. not as to some condition that arose under its own management and possession and control, over which we had no authority, and which was purely and simply the problem of the defendant purchaser.

We submit that under the facts and circum-

stances of this case, as shown on the face of the orders and by the stipulation of facts, that destination in this instance was Lompoc, California, at which point plaintiff had completed performance of every condition on its part to be performed, where title passed to the defendant, and where from that point on defendant had complete possession and control.

Obviously, the word "destination" is not meant the [52] ultimate geological point at which this celery was to be consumed. The defendant itself does not apply such a meaning to the word. On the face of the orders it shows the celery was to be transshipped to a steamship, the "Palisana" in Seattle.

We further learned today by the production of these abstracts and acceptances that the ultimate destination was Alaska. So when the defendant itself uses the word "destination," it doesn't mean the ultimate point of consumption or arrival. It refers to Seattle as the destination, but if it does so, it cannot use the word "destination" literally, because Seattle was merely a point of transshipment.

We, therefore, claim that under the defendant's own interpretation of the word, the point of destination was the point at which possession, control, and title passed from the plaintiff to the defendant, and that point was admittedly Lompoc, California. If in the construction of the word "destination," any uncertainty arises because of the conflicting provisions in the orders, i.e., and I quote it, "Delivery

F.O.B. origin." And the significance which is universally lent to that phrase, and the provision, and I quote again, "Inspection and acceptance at destination," then that uncertainty and ambiguity must be held against the defendant as the sole author of the instruments. This is the universal rule of construction and applies with equal force to government contracts. *Sculley v. [53] U. S., 197 Fed. 327. Sheridan Kirk Contracting Co. v. U. S., 52 Ct. of Claims 407.*

The Court: Are those quoted in your brief?

Mr. Haines: No.

The Court: Let me have them again.

Mr. Haines: *Sculley v. U. S., 197 Fed. 327. Sheridan Kirk Contracting Co. v. U. S. 52 Ct. of Claims 407.*

We submit that rule is the appropriate rule where the instruments on which the defendant relies were not only drafted by it, but were typed up 7 to 9 days after complete performance by the plaintiff, which never were submitted to the plaintiff for its approval, and were executed alone by the defendant, and they did finally mail us a copy of them.

I notice that counsel's argument today terminated upon the premise of public policy. We believe, too, that the question of public policy may have some consideration in this case. Let us review very briefly the facts in this case to see in which direction the court should lean, in that public policy is a factor. The produce in question is ordered by the defendant. It specifies a certain grade and quality. It specifies very specifically each and everything that should be

done with it; how it should be harvested, and how it should be wrapped and graded, how it should be shipped, and how it should be iced. It was inspected by its agent at origin. The entire handling of the produce was under the supervision of [54] its field agent. Everything that was done with this produce was done in accordance with the directions and requests of the defendant, and when it left Lompoc it was admittedly prime celery, not only up to 85 per cent U. S. No. 1 Standard, but, as each of the origin inspections show, above that point. Under those circumstances, if something went wrong with the handling of that celery from there on, I think it little behoooves the defendant in this action to try to insert some obstacle, bulletin or regulation, as a shield for non-payment of the produce, which was honestly delivered to it in perfect condition.

I think that perhaps when you speak of public policy, of what the defendant should do, it is to be animated by the spirit that the United States Supreme Court referred to when it said that it should be as interested in protecting the rights of the contractors or one of its bidders as its own rights.

Other than the matters discussed by counsel and myself, of course, there are other matters which are factual in nature. There is an issue as to whether inspection by the government was bona fide. Another issue of fact is as to why this produce did deteriorate, why it deteriorated, what happened to it after it passed into the possession and control of the government. We contend it is quite obvious that

the government, through negligence or otherwise, caused the [55] condition which caused it later to reject it, and that we cannot be held to blame for that condition, and that we are not cut off from receiving our just compensation because of the acts of the defendant in that regard.

The Court: I am going to rule on this motion, and I am going to deny the motion for summary judgment, and proceed to take the proof in this case. I will deny it without prejudice, if for any reason the government wants to renew it at the conclusion of the case, but it will be denied at this time.

Mr. Haines: Mr. Nelson.

MILTON E. NELSON

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your name, please?

The Witness: Milton E. Nelson, N-e-l-s-o-n.

The Clerk: Milton E. Nelson?

The Witness: Right.

By Mr. Haines:

Q. Where do you reside, Mr. Nelson?

A. In Lompoc.

Q. And what is your occupation?

A. Branch superintendent of the California Vegetable [56] Growers, Lompoc Branch.

(Testimony of Milton E. Nelson.)

Q. Did you occupy that position in the month of December, 1946? A. Yes.

Q. Now, are you personally familiar with the celery which is the subject-matter of this suit?

A. I am.

Q. Where was that celery grown, Mr. Nelson?

A. That particular patch was grown on the most westerly portion of the Lompoc Valley.

Q. How large a plot was it?

A. There was 11 acres in that plot.

Q. Do you recall how much celery was produced from those 11 acres?

A. There was approximately 11 cars.

Q. Was there any other celery grown in the Lompoc area that season?

A. No, not at that time there was not.

Mr. Grean: I object to this line of questioning, if the court please. I don't see that it is material to this case.

Mr. Haines: It is preliminary, your Honor.

Mr. Grean: You don't buy celery on the growing of it.

Mr. Haines: Particularly, in this regard we want to go into the condition of the celery and the growing conditions of the celery. [57]

Mr. Grean: The inspection certificate is indicative of the condition of the celery.

The Court: Overruled. Proceed.

Q. (By Mr. Haines): By the way, Mr. Nelson, how long have you been connected with the vegetable industry?

(Testimony of Milton E. Nelson.)

A. Well, other than about a year and a half, practically all of my working life, approximately 25 years. I have been with the California Vegetable Growers since '42, and preceding that with the Golden Rush Shippers at Santa Maria, and preceding that time, in my school days, my father being affiliated with the American Fruit Growers in the Santa Clara Valley, I spent most of my time in and out of the business there.

Q. You have been connected with the vegetable industry approximately 25 years, then?

A. That's right.

Q. And you are familiar with the various branches of it, the growing and packing and shipping of it?

A. That's right.

Q. And you had extensive experience, did you not, with celery—the growing and packing and shipping of celery?

A. That's right.

Q. Now, one of the diseases that attacks celery is what they call blight, is it not?

A. That's right. [58]

Q. It also attacks other vegetables, I believe?

A. It does, very definitely.

Q. What do you mean by the term "blight," in connection with celery in particular, Mr. Nelson?

A. Well, blight is especially dangerous to celery, the black and the brown blight. It is a fungus organism that attacks the plant in spores, and is carried to the plant by many ways. In fact, actually there is very little known about blight. It is microscopic in size. It is carried in by wind and rains,

(Testimony of Milton E. Nelson.)

by insects, especially aphids carry the virus, and in appearance it is black and brown mottled spots and patches on the foliage.

Q. You say "in appearance." You mean the appearance of the result of blight?

A. Well, the first stages. The first stages show up small black and brown spots on the foliage. Then because of some atmospheric conditions, weather or otherwise, heating or some other condition such as that, it deteriorates rapidly or grows rapidly, and actually deteriorates into decay, which is what it amounts to.

Q. Where does blight ordinarily originate, in the first instance?

A. Well, as I said before, there is very little known about it. It is an inherent weakness of celery, that blight is there, and it is carried by, as I say, these insects and [59] by wind.

Q. Is it found in the field in the growing stage?

A. Very definitely. It is found in the ground, and it is carried by tools, and it is just actually in most—in fact, there are very few celery fields where there isn't a certain amount of blight in and around them.

Q. Was the condition under which this particular celery was grown favorable or unfavorable for the presence of blight in the growing stage?

A. Well——

Mr. Grean: I object, your Honor.

The Court: Overruled.

The Witness: The fact that there was only the

(Testimony of Milton E. Nelson.)

single celery field in the valley, why, actually, if there are other fields adjacent, why, you have a little concern for the fact that if one is affected, why, the spores will carry into another field. But, as I pointed out, this particular field was in the most westerly portion of the Valley, the growing portion of the Valley, and our prevailing wind is from the west. So it is rather obvious that it could not have been carried from that particular section to the celery or other vegetables.

The Court: Now, have you completed your answer?

The Witness: Yes.

Q. (By Mr. Haines): You have testified that the effect [60] of blight on celery is to eventually cause it to develop decay or rot?

A. Very definitely. In certain conditions it travels faster than others. I have even known it to disappear. When you have it in your field, of course that is one of the big problems for a farmer. He dusts the field, which is a corrective measure for it. But it can be there and not be too noticeable; in fact, not noticeable at all.

Q. Did you personally supervise the harvesting and packing and shipping of the celery in question?

A. I did.

Q. That was under your auspices as the manager of the Lompoc Branch of the California Vegetable Growers?

A. Yes. In fact, this particular section was

(Testimony of Milton E. Nelson.)

rather irregular and I paid a little more specific attention to it.

Q. Were you préesnt when it was inspected by the United States Department of Agriculture?

A. Very much so.

Q. Was it shipped immediately after it was inspected?

A. We have a 7:00 o'clock pull-out on our train there at night, and the car that left on the 14th was packed on the day of the 14th and pulled out at 7:00 o'clock that night.

Q. And the cars inspected on the 16th, when did they leave?

A. They were pulled out on the 7:00 o'clock pull. [61]

Q. On the same day?

A. On the 16th, the same day, that's right.

Q. You say this was an unusual method of handling this celery?

Mr. Grean: If the court please, may we ask that the witness not be led.

The Court: It is a preliminary question. The objection is overruled.

Q. (By Mr. Haines): Who directed you as to the manner of handling this celery in connection with its wrapping and in connection with the type of crate it went into, and any other matters?

A. Well, that was dictated by our sales office, which is located in Guadalupe. They had accepted this order for 1,490 crates of celery, which was to be a special wrapped package, which is irregular as far

(Testimony of Milton E. Nelson.)

as general commercial purposes. That is, usually it is a naked pack, with pack to size, of standard size packing. In this particular instance they required 85 per cent No. 1 grade or better, it had to be packed in a wire-bound container with a stenciled head, and each individual package had to be parchment wrapped, and in this particular instance size had nothing to do with it. We packaged from one-dozen size to five-dozen size in the same package, which is rather irregular. In fact, it renders it useless for any future commercial sale. [62]

Q. You say each individual stalk was wrapped?

A. That's right.

Q. What type of material was used for wrapping?

A. It was a piece of parchment paper. As I recall the size, they ranged from about 15 to about 20 inches square. This particular type paper being parchment and treated with sulphuric material actually made it a non-porous material.

Q. And each stalk was wrapped that way?

A. That's right; wrapped and sealed. When you wrapped the package that way and placed it in a container, and you folded back your edges, you made practically a sealed container for that individual stalk.

Q. In your 25 years of experience in the vegetable industry, did you ever wrap celery like that before?

A. That was my first experience.

Q. Have you ever done it since?

(Testimony of Milton E. Nelson.)

A. No, not in that particular way.

The Court: Were the tops wrapped in the package as well as the stalks or did the package just cover the stalks?

The Witness: The celery stalk itself was clipped to 16 inches in length, and this stalk was rolled into the parchment paper.

The Court: It covered both ends in it?

The Witness: It didn't cover it, but when you placed it in the crate, it had a tendency to fold over on the edges. [63]

The Court: I am speaking of the simple operation, and maybe I haven't made myself clear.

The Witness: All right.

The Court: Here is a bunch of celery, and it has stalks, and you cut it off to 16 inches.

The Witness: Yes.

The Court: And you cut off the top.

The Witness: Yes.

The Court: And you put it on the parchment paper, and you wrap it up.

The Witness: Yes.

The Court: When you wrapped it up, did it cover the part where the leaves are, or did it cover the stalk, leaving the leaves open?

The Witness: No, it covered the entire length of the stalk.

The Court: But did it cover the leaves?

The Witness: Yes, the top of your leaves were practically covered. In other words, there was very little foliage sticking out.

(Testimony of Milton E. Nelson.)

Q. (By Mr. Haines): But did it cover the foliage?

The Court: Was the foliage wrapped into the package?

The Witness: It was totally covered.

Q. (By Mr. Haines): That was at the direction of the government, was it not? [64]

A. That is right.

Q. Mr. Nelson, basing your answer on your own personal knowledge—I will withdraw that question. Do you know Mr. Donald Nelson? A. Yes.

Q. Who is he?

A. He was representing the Quartermaster, and I believe was the purchaser in this instance, representing the government as the purchaser.

Q. Was he present while this produce was being handled?

A. On the initial day, at the initial operation he arrived with the stencil, and supervised the initial packing of the operation, as we were unfamiliar with it altogether. It was our first experience.

Q. He personally was there?

A. That is right.

Q. And dictated the manner in which it was to be wrapped and otherwise handled?

A. That is right.

Q. —and packed into the containers?

A. That's right.

Q. All right. Now, basing your answer, Mr. Nelson, on your personal knowledge, describe the quality and condition of all three carloads when they

(Testimony of Milton E. Nelson.)

were placed on the carrier for shipment at Lompoc. [65]

A. Well, this particular batch of celery, being 11 acres in size, was what we call on the young side. It was even immature, which our inspection certificates here show. The hearts were fairly well formed. In fact, we started harvesting this field on the 2nd of December, terminating the harvest, I believe, about the 22nd; and, in fact, we stalled our harvest, in that we wanted to be sure we had the standard length hearts. There were some crates in the early phases of the harvest with the immature hearts. So it is obvious that when you have immature hearts, your field is on the young side.

Well, actually, that is the way we like to ship this produce, in that when you have a field more or less on the young side, it is resistant to anything that may come along in a defective way, and it assures you of better carrying.

Now, the fact that the inspector—and I recall his name pretty clearly, was Montano—found worm damage and found mechanical injury, but showed no blight or decay in any of his inspections of the three cars.

Now, in my opinion, this particular package, with these stalks wrapped tightly in this parchment paper, non-porous parchment paper, if there were any of these blight spores in the celery, in my experience the only way—there must have been a situation existing or a condition existing along the way causing that blight to travel so rapidly

(Testimony of Milton E. Nelson.)

that it [66] created a decayed condition after seven days.

The Court: Now, wait. I don't understand that answer or that statement. You started out with something, but you didn't finish with it. I don't know that I understand that last sentence. As I understand it, and see if I am right, the only way that this blight could have caused decay damage in this celery was because of some situation which occurred along the way? Is that what you are telling us?

The Witness: That's right. What I am trying to point out, your Honor, and which I have stated before, is that the blight, being even microscopic in appearance, could have been in the plant and not visible at the time of inspection. However, wrapping it in a non-porous tight container, such as this irregular process and procedure was, and then shipping it for seven days, obviously it had some bearing on the rapid growth of this bacterial agent within the package.

The Court: That is your conclusion.

The Witness: Pardon?

The Court: That is your conclusion.

The Witness: That is right. In my opinion, from my experience and knowledge of this blight condition, it had to be something—a change of humidity or a lack of icing, refrigeration, along the way, or something had to develop to cause that blight condition to travel as rapidly as it did. In

(Testimony of Milton E. Nelson.)

fact, your second and third inspection showed decay after seven days. [67]

The Court: That was bad, wasn't it?

The Witness: Pardon?

The Court: That was bad, wasn't it?

The Witness: That is definitely bad.

The Court: All right. Go ahead.

The Witness: In my opinion, and in my experience, I know that the wrapping of that package, either the material or lack of refrigeration, or something that developed along the way out of our control was the cause, because, so far as we were concerned, on the day of shipment there was absolutely no blight in the package.

Q. (By Mr. Haines): You say, Mr. Nelson, there was absolutely no blight at the time it was shipped. To be more accurate, is it not true that all celery has a certain amount of blight, just like every human body has a certain amount of germs?

A. Celery has an inherent weakness for this type of blight.

The Court: There was no blight visible, is what you mean?

The Witness: No blight visible, that is right.

Q. (By Mr. Haines): The fact is there was some unnoticeable amount present?

A. That's right.

Q. Which could, nevertheless, result in a bad condition, [68] so far as blight or rot is concerned, if it was not properly handled en route to wherever it was going?

A. Absolutely.

(Testimony of Milton E. Nelson.)

Q. You also state that in this instance, in your opinion, the manner in which this particular celery was wrapped was a factor? A. I do believe so.

Q. Now, will you give us a little more of your reasoning on that point, Mr. Nelson? Why do you think that this particular type parchment wrapping was a contributing factor in the condition of the celery upon its arrival in Seattle?

A. Well, for one thing, we had shipped several thousand crates at this point, that had gone to all points in the nation, Detroit, Chicago, and in miscellaneous mixed cars, and we at all times failed to have any blight condition exist.

Q. And it was all from this same lot?

A. From this same field, and when this one lot of 1490 crates ended up with a bad decayed condition, it is obvious to me where on the earlier arrivals there weren't any problems of kick-backs, as we call them, and it is hard to understand why in seven days we should have a bad case of blight decay end up in this particular package.

Q. Confining your answer to the specific thing that I directed your attention to, Mr. Nelson, why, in your opinion, [69] do you think that this parchment wrap is a contributing factor?

A. Well, I feel, it being non-porous, it heated the package, and I know there is nothing worse than a heated stalk of celery to rapidly decay.

Q. As a matter of fact, a stalk of celery is as hot as a living organism, is it?

A. That's right.

(Testimony of Milton E. Nelson.)

Q. And requires air?

A. Well, it certainly deteriorates if it doesn't have any air.

Q. What was the effect of this parchment wrap on the celery getting air?

A. Well, as I pointed out, in my opinion, the rapid progress of the decay was due to the heated condition caused by the wrap.

The Court: You haven't answered the question. The answer is obvious. If it was wrapped up, it didn't get air.

The Witness: I see.

The Court: Go ahead.

Q. (By Mr. Haines): Basing your answer, Mr. Nelson, on your personal knowledge of this particular celery, in your opinion, was that celery a type and of a quality and of a condition which made it suitable for export when it left Lompoc, California? [70]

A. That celery was young prime celery. It was crisp, it was fresh, and rather immature.

The Court: You can answer that question "Yes" or "No." Was it suitable for export when it left Lompoc?

The Witness: Yes, very definitely so.

Q. (By Mr. Haines): Did you sell any other celery to the Army out of this same plot during the same season?

A. We sold 180 crates to the Army in a mixed car with lettuce several days preceding this order, for arrival in Chicago.

(Testimony of Milton E. Nelson.)

Q. It went to Chicago?

A. That's right.

Q. Does that take longer than the trip to Seattle?

A. Ordinarily, it is about a day further.

Q. Was there any complaint as to condition on that carload? A. None, no.

The Court: Was it also wrapped?

The Witness: No, it wasn't.

Q. (By Mr. Haines): It was loose packed?

A. Loose packed; standard commercial pack.

Q. In fact, you have already testified this is the only lot you ever treated in this manner?

A. That's right.

Q. Now, in connection with the inspection of this celery [71] after it arrived at Seattle, how long after arrival is it customary to leave the celery stand in the cars before it is inspected?

Mr. Grean: I object to that question. This man isn't qualified to testify as to what the inspection was at Seattle.

Mr. Haines: That wasn't the question. Let me put it this way. I will withdraw the question.

The Court: Do you think this man is qualified to testify to those matters? He is a shipper. He is not an inspector. He is on the shipping end, not on the inspecting end on arrival.

Mr. Haines: My question wasn't directed to the inspection, your Honor. Let me rephrase it, and I will get the element in it that I want.

The Court: All right.

Q. (By Mr. Haines): Do you know of your own

(Testimony of Milton E. Nelson.)

knowledge and from your own experience, how long from the very point of good practice in the handling of celery, how long an interval is usually allowed to take place between the time it arrives and the time that it is inspected?

A. Well, the inspection should be made soon after arrival. There would not be any reason for it to sit around for several days before it was inspected.

Q. In this instance it was shown, and as a matter of evidence in this case it was shown that one of the cars was [72] not inspected until 20 hours after its arrival, another one 31 hours, and a third one 61 hours.

The Court: The third car what?

Mr. Haines: 61 hours.

Mr. Grean: I object to the statement of the evidence as not evidence produced by the plaintiff. If there are indications here as to the arrival time and the time of inspection, there is documentary evidence, and they speak for themselves.

Mr. Haines: It is all in the evidence, your Honor. The defendant has made a motion upon all the records, pleadings and files in the case. The inspection slips are a part of the evidence.

The Court: Do the inspection slips show that?

Mr. Haines: Yes, the inspection slips and the arrival slips.

The Court: Objection overruled. That does not mean that the inspection slips show it, but if coun-

(Testimony of Milton E. Nelson.)

sel contends that, he can show you that. Objection overruled. Go ahead with your question.

Q. (By Mr. Haines) (Continuing): Mr. Nelson, do you consider that under normal and proper practice that that much time should have elapsed between the arrival and the inspection of the celery—referring to the times that I just named here? [73]

A. Well, the fact that these packages were to be exported to Alaska, why, I would think they would proceed with inspection on arrival rather than waiting for several days after arrival, if they expected to ship it.

Q. What would have been the effect upon this celery if some place along the route the doors of the cars had been left open for, say, a matter of five or six hours?

Mr. Grean: I object to that question. There is no showing in this case that anything happened along the line to the cars. To speculate what would happen I think would be immaterial.

The Court: I think that is speculative. Objection sustained.

Q. (By Mr. Haines): What is the effect upon celery if the doors of the refrigerator cars are left open?

A. Well, as with any other vegetable, if a car is going into the icing station and is to be retopped, or something, and the doors are left open, it naturally has an effect upon the refrigeration of the car.

(Testimony of Milton E. Nelson.)

Mr. Grean: I ask that the answer be stricken as not being a matter in issue. As to what would happen if the doors were left open is immaterial.

Mr. Haines: This man is an expert, and he can testify as to what would happen.

The Court: Well, there is no jury here. I will overrule [74] the objection and let the answer stand. We are trying the case without a jury, and unless there is some evidence to connect it up the court is not going to speculate as to what might have happened.

Mr. Haines: What we had in mind in particular, your Honor, is those cases that we cited in our reply, that where the buyer takes possession and title to the goods, then the burden is upon him to show that if anything happened to it en route, it was properly handled.

The Court: We will cross that bridge when we get to it.

Q. (By Mr. Haines): The first of these three carloads, I believe you testified, left Lompoc on the 14th of December, 1946? A. That is right.

Q. And the other two left on the 16th of December? A. That's right.

Q. Now, on the morning of the 16th day of December, did you have a conversation with Mr. Donald Nelson, the gentleman you referred to earlier in your testimony?

A. I don't recall whether it was Don Nelson, or whether it was our sales office, but one or the other

(Testimony of Milton E. Nelson.)

called me about 11:00 o'clock, and wanted to cancel——

Mr. Grean: Just a moment. I object to what was said by the sales office. [75]

The Court: It goes to the weight. He said it might have been Nelson or it might have been the sales office. Of course, that doesn't give the court very much to hang its hat on.

Mr. Grean: We object to any conversations this man might have had with some speculative person.

The Witness: This is important, however, what I am trying to point out.

Mr. Grean: Just a minute. The court will decide what is important in this case. You wait until the court rules.

The Witness: Mr. Haines——

The Court: Just a minute.

Mr. Haines: Just a minute, Mr. Nelson.

The Court: I think we ought to have more certainty than this. What is the court to do, if I admit this testimony. He said he talked either to his sales office or to Nelson.

Q. (By Mr. Haines): What is your best recollection as to whom you talked to on that occasion?

A. Well, let's say I talked to the sales office.

Q. What is your best recollection, not just "let's say"?

A. The fact is that I talked to the sales office two or three dozen times a day, and whether the sales—Nelson had called the sales office, and he, in turn, called me to [76] cancel these cars.

(Testimony of Milton E. Nelson.)

Mr. Grean: I object to the statement as hearsay.

The Court: The statement may go out. Is it your best recollection that you talked to the sales office?

The Witness: Let's put it that way, yes.

The Court: The objection is sustained.

Mr. Haines: We will withdraw the question, then, your Honor. That is all.

Cross-Examination

By Mr. Grean:

Q. Mr. Nelson, what sort of blight were you referring to when you were testifying about the effect of blight? Was that early blight, or late blight, or bacterial blight?

A. Well, as far as I know, it evidently was a bacterial blight. It was a fungus blight.

Q. Isn't early blight and late blight also a fungus blight?

A. Well, I do not profess to be a biologist. I am just a grower and a shipper, and I know blight when I see it, and we proceed to do something about it.

Q. But you don't know what kind of blight it is?

A. The fact——

Mr. Haines: That is objected to on the grounds it is assuming a fact not in evidence. He did not see the blight in Seattle. [77]

The Court: Objection overruled. This is cross-examination. He says there is always some amount of blight in every celery crop.

Q. (By Mr. Grean): Suppose I told you that

(Testimony of Milton E. Nelson.)

the inspection certificate rendered at Seattle on behalf of the plaintiff in this case showed watery soft rot. What type of blight would you say had caused this condition?

Mr. Haines: Well, I would suggest, counsel, you show him the certificate and let him study it.

Mr. Grean: I will be happy to.

The Court: The objection is overruled, if there is an objection.

The Witness: Will you, please?

Q. (By Mr. Grean): Yes. Suppose the inspection certificate showed it to be watery soft rot. What sort of blight would you say would be the cause of that?

A. Well, to tell the truth, I couldn't answer that question. I believe it would be a bacterial type blight that would cause it to develop like that. However, there was no evidence of that when the package left Lompoc.

Q. Just a minute. You will please confine your answer, if you will, to my questions. A. Yes.

The Court: The latter part of the answer may go out, beginning with, "However, there was no evidence." [78]

Q. (By Mr. Grean): I call your attention to a condition commonly known as bacterial soft rot, and ask you if you know what kind of blight causes that condition?

A. As far as I know, it is a fungus. It is a pathogenic organism which attacks the plant, and, as I pointed out, microscopic in nature, and has a

(Testimony of Milton E. Nelson.)

tendency to travel under certain humid conditions, and it creates decay, but does not start out as a decay.

Q. Could it be present without being seen?

A. Absolutely; absolutely.

Q. In other words, it could be there and inspected, and still not show in the inspection because it would be invisible?

A. Absolutely. That is an inherent weakness in celery. It is microscopic in appearance, as we have pointed out. It is very possible it could have been there. However, it takes a situation or a condition——

Q. Now, just a minute.

Mr. Haines: I believe he can explain that answer, your Honor, and I would like him to complete it.

The Court: Yes, he may complete the explanation. He says it can be present and not seen. What else do you want to say about it?

The Witness: It is not visible to the eye. It would be microscopic, and I might say to the gentlemen in the first [79] row, who are very familiar with this phase of blight, specialize, in fact, in blight, know it can be available in the plant and not visible to the human eye. There is no reflection on the——

The Court: You have said it in a half a dozen different ways, and you have said it can be present and not be seen. Isn't that all? Do you want to add anything else?

(Testimony of Milton E. Nelson.)

The Witness: I would say that it is no reflection on the particular inspector that he missed it, because it can't be seen.

The Court: That may go out.

Mr. Haines: You were making some comment on its development under certain conditions.

The Witness: That's right. And I have just answered this gentleman's question, "Was it visible?" And I say that it is possible that it wasn't visible.

Mr. Grean: Is this to be voluntary?

The Court: No, it is not to be. Let's go ahead. Proceed with your questioning.

Q. (By Mr. Grean): Assuming that blight spores were there and could not be seen, under normal circumstances how quickly could that develop, according to your experience, if you know?

A. Well, as I before have pointed out, depending on conditions, and with such as this tightly wrapped non-porous [80] paper around it, it could have developed very much faster, at a faster rate.

Q. Didn't you testify that this was your first experience with this wrap?

A. Yes, with this type of paper.

Q. What type of paper was it?

A. It was a parchment paper, and it was an oil base paper.

Q. I know what type this is. What type wrapping have you done?

A. The celery wrapping we have done was in a pliofilm container of a cellophane nature, a clear, transparent package.

(Testimony of Milton E. Nelson.)

Q. Porous?

A. It has a tendency to breathe, yes.

Q. Pliofilm does have a tendency to breathe that parchment does not?

A. Pliofilm is the material they are using today for the packaging of celery, and it has a tendency to breathe.

Q. For what purpose was the celery wrapped or packaged in the cases you are speaking of?

A. Well, actually for consumer purposes; the matter of sales, retail sales.

Q. Isn't it a fact that it is wrapped for preservation? A. That could be a part of it, yes.

Q. Wasn't that the reason for the wrapping in the case [81] that was shipped to Seattle?

A. We presumed it to be.

Q. What would you say would be the ideal temperatures for the transportation of celery under ideal conditions?

A. Well, as far as I know, if your refrigeration was low enough to keep the normal cool temperatures, why, certainly, in my experience, with the blight tendency of celery, in seven days, unless something very irregular happened——

The Court: No. Wait a minute. Don't argue. He asked you what would be the ideal temperatures for the transportation of celery. Do you know?

The Witness: As I pointed out, I am not proficient at knowing what the refrigeration temperatures should be in travel.

(Testimony of Milton E. Nelson.)

The Court: Then your answer is, "I don't know"?

The Witness: I don't know.

The Court: All right. Let's get on, and not roam around with all of this.

Q. (By Mr. Grean): While employed by the California Vegetable Growers in this time, did you have occasion to enter into other contracts with the government?

A. Not to my knowledge. You mean with this patch of celery?

Q. No, for any produce.

A. We shipped many cars of lettuce purchased by the [82] Army.

Q. In other words, you have had very many dealings with the government?

A. Very many, that's right.

Q. How long did it take to inspect the celery at the point of origin?

A. How long did it take?

Q. Yes.

A. Well, it took approximately three hours to pack the car, and the inspector was there at all times.

Q. Well, the inspection started on the 14th, did it not? A. Right.

Q. How long did the inspection which was started on the 14th take? It was not completed until the 16th?

A. Well, there was one car that was shipped on the 14th.

(Testimony of Milton E. Nelson.)

Q. I beg pardon?

A. There was one car that was shipped on the 14th; that was shipped, loaded and pulled on the 14th.

Q. I call your attention to the inspection certificate which is Plaintiff's Exhibit 2, Certificate No. 65048, and 65049, which is Exhibit 1. This states, "Inspection begun 3:30 p.m., Dec. 14, 1946." You were there at the time?

A. Right; yes. [83]

Q. "Completed 10:30 a.m., December 16, 1946."

Mr. Haines: What is the question?

The Court: He has shown the exhibits to the witness. We haven't got a question yet.

Mr. Grean: I believe the witness was asked why, if inspection was started on the 14th, it was not completed until the 16th.

The Witness: Well, how about the first car that left on the 14th?

Mr. Grean: I am asking you in regard to these two cars.

The Court: Can you tell us about that?

The Witness: Yes, I certainly can. These two cars here, the order was placed with us on the evening of the 13th, or possibly the morning of the 14th. It was a physical impossibility to pack those three cars in a single day, so it is the packing procedure to complete what you can. In the case of this one car, having been shipped on the 14th, it was loaded and inspected, and I think you will find this inspection certificate to show the 14th completed.

(Testimony of Milton E. Nelson.)

And on these particular cars, it was evidently what we call a baby load, that is, there was probably a portion of each of these cars completed on Saturday night, the score was taken on these cars on Saturday, and then they were completed Monday morning. And if you will check this termination, it shows [84] it was 10:30 a.m.

Q. 10:30 a.m., December 16th, and 9:00 a.m., December 16th. Now, was the celery that was being packed at that time kept under refrigeration?

A. Pardon?

Q. Was the celery that was being packed and inspected at that time kept under refrigeration?

A. Certainly.

Q. From Saturday night to Monday morning?

A. Certainly. The number of crates that was placed in the cars were blown with top ice.

Q. Blown with top ice?

A. That's right.

Q. How about the ones that had not yet been loaded?

A. Well, when we terminate our packing at the end of a day, probably on Saturday night, we have nothing left at the end of Saturday night. There is no loose stuff or produce on the floor carried over the week-end. We don't like to do that.

Q. Where was the balance which was completed by 9:00 a.m. on December 16th in the meantime?

A. The balance of that produce was still in the field, not having been completed as to harvesting.

Q. What time do they start working in the field?

(Testimony of Milton E. Nelson.)

A. Well, in this particular case, where it was December, [85] they probably started at 7:00 o'clock in the morning.

Q. And the balance of approximately 500 wire-bound 16-inch crates were harvested, wrapped, packed, and loaded in the car by 9:00 a.m.?

A. On one car, that is what it says, your baby, which is two hours. Of course, we don't know off-hand how many crates was in the car on Saturday night.

Q. Was this celery washed?

A. Absolutely.

Q. Where was it washed?

A. At the packing plant on West Laurel Avenue, Lompoc.

Q. In the packing plant? A. Yes.

Q. Not at this western field where this celery crop was located?

A. That is where the harvest took place.

Q. But it was actually washed at the packing plant? A. Yes, sir.

Q. Tell me is it possible in washing to spread blight spores, in the spraying?

A. In my opinion and experience, it probably could be.

Mr. Grean: That is all.

Mr. Haines: That is all.

The Court: Step down.

(Witness excused.) [86]

Mr. Haines: The plaintiff rests, your Honor.

Mr. Grean: At this time, if the court please, the defendant renews its motion, and at this time upon the further ground that the plaintiff has not shown a prima facie case. He has not overcome the inspection certificates, which are a part of the record in this case. He has not by any means shown any act on the part of the defendant which would in any way cause the deterioration of this celery, other than its own inherent values. And further than that, your Honor, because of the fact that the carrier, contrary to the statement of the plaintiff, is not the buyer's agent to accept the goods, as corresponding with the contract, even though he may be his agent to receive and transport the goods.

The Court: The plaintiff does not intend to offer any proof as to the conversations between the plaintiff company and this purchasing agent?

Mr. McIntyre: We can call Mr. Nelson as an adverse witness under what is the equivalent of Section 2055 of the California Civil Code for cross-examination. We intended to bring that out on cross-examination.

The Court: Well, you are trying your case, and I don't want a law suit to be a game. I am trying to find out what the facts are. You made the contention that this purchase order was written after the celery was shipped, and it did not comply with the oral agreement. You have offered no proof [87] of that at all. In the present state of the record you are going to have to rest entirely on the purchase orders in the shape they are in.

Mr. McIntyre: Could I have that repeated, your Honor?

The Court: You made the contention, as I understood you, that the purchase order did not comply with the oral understanding. You made a point, which I made a note of, that even if this was a contract, a unilateral contract, a contract of this sort must truly reflect what the meeting of the minds was. I assume, therefore, that you contend that these purchase orders do not reflect what the actual meeting of the minds was, between your company and some agent of the government, but you have rested without any proof of that.

Mr. McIntyre: Well, your Honor please, of course the difficulty in trying a case like this is the fact that I do not believe any of us can hold all the facts that were stipulated to in the mind all at one time. Here is what our contention is. Our contention is based not only on the evidence of Mr. Nelson, but upon the stipulated facts, and including these purchase orders, and including these abstracts which were introduced in evidence this morning. Our contention is that that celery was purchased F.O.B. origin, Lompoc; that on top of being purchased under that condition, that it was also purchased subjection to inspection at origin. [88]

The Court: Which you claim was Lompoc?

Mr. McIntyre: Which we claim was Lompoc.

The Court: You want to base those contentions entirely on the written documents?

Mr. McIntyre: And the stipulated facts. The stipulated facts, your Honor, admit that the prod-

uce more than met the requirements at Lompoc. The requirements were 85 per cent. The three certificates, I think, show in each instance something higher than that.

The Court: Let me get your contention now. In other words, you are basing your case, then, on the written purchase orders which are Exhibits G, H and I, and that because they state, "Delivery F.O.B. origin," that, therefore, the destination was the origin?

Mr. McIntyre: That is correct.

The Court: And the destination was Lompoc?

Mr. McIntyre: I think that is right.

The Court: Let me finish.

Mr. McIntyre: I beg pardon.

The Court: And if the purchase orders, Exhibits G, H, and I, provided for inspection and acceptance at destination, that meant acceptance and inspection at Lompoc?

Mr. McIntyre: That is right.

The Court: And since the certificates of inspection showed the celery was O. K. at Lompoc, therefore you have [89] complied? That is your contention?

Mr. McIntyre: That is it in part. I think there were a few more facets to it. To begin with, it is our contention that the only inspection called for, so far as the parties were concerned, was the Lompoc inspection.

Now, I recall counsel making some statement that the inspection at Lompoc was for quality and the inspection at Seattle was for condition.

I think that it is very apparent on the face of it that that statement is a bit on the ridiculous side. If, for instance, at Lompoc the inspection showed there was rot in this celery, it would have been rejected there. I don't believe we can be asked to believe anything else, so the inspection at Lompoc was not only for quality, but for all purposes.

The Court: We are getting at something else. My question was whether you want to rest your case or want to offer proof as to anything other than this document. In other words, what you are doing is basing your entire case upon the wording and the legal interpretation the court will place on Exhibits G, H, and I.

Mr. Haines: I think the point Mr. McIntyre brought out here is important. I think we want also to refer to these abstracts of offer and acceptance that were offered this morning. That shows, upon the face of that, as it does upon [90] the face of the purchase orders, that the inspection was supposed to be at Lompoc.

The Court: Where do you see that?

Mr. Haines: I am referring to the abstract of an offer—I don't know what the number of it is.

The Court: Yes, I have them before me. They are J, K,——

Mr. Haines: "Inspection points, Seattle," and then beyond that to the right——

The Court: Which one are you referring to now? Abstract of Offering or Bids Received?

Mr. Haines: I am referring to the Abstract of

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The Court: Yes, I have them before me. They are J, K,—

Mr. Haines: "Inspection points, Seattle," and then beyond that to the right—

The Court: Which one are you referring to now? Abstract of Offering or Bids Received?

Mr. Haines: I am referring to the Abstract of

Offering in connection with purchase order No. LA 8261.

The Court: All right. Let me find it.

The Clerk: That is Exhibit J, your Honor.

The Court: All right.

Mr. Haines: You will note that to the right of "Inspection Points" there is the word "Seattle," and then to the right of that "Market Center or N.M.C."

Now, we ascertained——

The Court: All right. I have found the place you are referring to now, "Inspection Points." Go ahead.

Mr. Haines: ——"Seattle," and then to the right of that, "Market Center or N.M.C." Now, we were informed by counsel this morning that "N.M.C." means Naval—What is [91] the rest of it?

Mr. Grean: Navy Markets Center.

Mr. Haines: ——Navy Markets Center. We contend that the Market Center up above is the Market Center in Los Angeles, which placed this order, and that it had to be, and it was the Los Angeles Market Center which was the contracting agency.

The Court: I have your contention. Now I will go back to what I said. Do you want to rest your case or do you want to not rest your case?

Mr. Haines: I would like to call Mr. Nelson, Donald Nelson to the stand, and ask him some questions.

The Court: All right. I will permit the plaintiff to reopen its case, and as to your motion, you can remake it when the plaintiff rests.

Mr. Grean: Thank you. May we have a short recess, your Honor.

(A short recess was taken.)

The Court: By the way, Mr. Nelson can be called under Rule 43(b), which is the equivalent of Section 2055 of the California Code of Civil Procedure, and be examined under cross-examination.

Mr. Haines: Mr. Donald Nelson. [92]

DONALD L. NELSON

called as a witness under the provisions of Rule 43(b), having been first duly sworn, was examined and testified as follows:

Direct Examination

The Court: Is this Mr. Nelson any relation to the other Mr. Nelson?

Mr. Haines: None whatsoever.

The Court: Except that they have the same last name.

Mr. Haines: Yes. They are both of Scandinavian ancestry.

The Clerk: State your name, please.

The Witness: Donald L. Nelson.

Q. (By Mr. Haines): What is your occupation, Mr. Nelson?

A. I am a purchasing agent for the Army.

Q. Did you occupy that position in the month of December, 1946?

A. I was then known as a marketing specialist.

Q. Where were you located in December of 1946?

A. Guadalupe Field Buying Office.

(Testimony of Donald L. Nelson.)

Q. How is that?

A. Guadalupe Field Buying Office.

Q. Did you enter into negotiations with the California Vegetable Growers during that month and, more particularly, on the 13th day of that month in reference to the purchase of 1,490 crates of [93] celery?

A. I did.

Q. With whom did you negotiate that contract, Mr. Nelson?

A. What was that question again?

Q. With whom did you negotiate that contract?

A. I, of course, don't recall, but I think it was

A. L. Turner.

Q. And Mr. Turner was sales manager——

A. That is correct.

Q. ——for the California Vegetable Growers?

A. Yes.

Q. Where did these negotiations take place?

A. Well, I imagine either on the phone or in his office.

Q. Do you recall what was said by you and what was said by Mr. Turner on that occasion?

A. I do not.

Q. You recall that you asked to be supplied with 1,490 crates of celery?

A. I have seen records and I have refreshed my memory to that extent.

Q. Have you seen any other records that have refreshed your memory as to any other details of the transaction?

A. To what do you refer?

(Testimony of Donald L. Nelson.)

Q. Well, I refer to the type of celery that was discussed? [94]

A. That information is on the abstract, yes.

Q. And the manner in which it was to be wrapped? A. That's right.

Q. And the manner in which it was to be shipped? A. That's right.

Q. And the manner in which it was to be iced en route, and the inspection of the celery at Lompoc?

A. The inspection was the normal inspection procedure, calling for an origin inspection for grade and a destination inspection for condition.

Q. The inspection that I am referring to is the inspection at Lompoc?

A. That was a grade inspection.

Q. There was an inspection at Lompoc?

A. Sir?

Q. There was an inspection at Lompoc?

A. You have supporting certificates?

Q. Well, I am just asking you.

The Court: Do you know of your own knowledge whether there was an inspection?

The Witness. Sir?

The Court: Do you know of your own knowledge whether there was an inspection?

The Witness: Yes.

Q. (By Mr. Haines): And that was conducted by the [95] United States Department of Agriculture? A. That's right.

(Testimony of Donald L. Nelson.)

Q. And that inspection showed the celery to be equal, or more than equal, to the grade required?

A. That is very true.

Q. And also showed there was no blight present?

A. None was indicated.

Q. You yourself were present, were you not, when a portion of the goods was handled.

A. That is the normal procedure. I would be there.

Q. You were there?

A. I would be there, yes, sir. I do not recall that, but I would be. That is my job.

Q. To see that it was crated properly and wrapped properly?

A. That's right.

Q. Do you recall the particular wrap that was used on this particular occasion?

A. What was that?

Q. Do you recall the wrap that was used on this particular occasion?

A. That's right.

Q. What was it?

A. Well, it was a parchment paper wrap.

Q. What is the characteristic of parchment, so far [96] as being porous or non-porous?

A. Well, it retains its strength under moisture. Frankly, I don't know much about paper making, and I am not an expert on that point.

Q. You don't know whether it is porous or not?

A. No, I don't.

Q. It has an oil content, does it not?

A. Sir?

Q. It has an oil content, does it not?

(Testimony of Donald L. Nelson.)

A. Not to my knowledge.

Q. Well, you know, of your knowledge, that the goods in question were inspected at Lompoc?

A. I am slightly hard of hearing. I will have to ask you to speak a little louder.

Q. I say, you know, of your own knowledge, that the celery was inspected at Lompoc?

A. That's correct.

Q. And you know the inspection did not show any blight or rot?

A. That's correct.

Q. And you know the goods were wrapped and shipped and packed in accordance with your own instructions?

A. That's correct.

Q. And that the icing was in accordance with your own instructions? [97]

A. That's right.

Q. Do you know whether the goods were inspected at Gerber, California, en route?

A. They would not be inspected. They would be re-iced at that point.

Q. I call your attention to the War Department Purchase Order, Government Order No. 8260.

The Court: That is Exhibit H?

Q. (By Mr. Haines): Exhibit H, and I call your attention to the following language, "Unit price includes top ice. To be re-iced at Gerber. Federal-State Inspected."

A. Federal-State Inspected.

Q. That's right?

A. That is another sentence there in another paragraph, not included in the icing instructions.

(Testimony of Donald L. Nelson.)

Q. That is your conclusion, is it not, Mr. Nelson?

A. Knowing the terms of that contract, that is more than a conclusion. That merely calls for re-icing at Gerber, re-top-icing, rather.

Q. Did you re-dictate the terms of this contract?

A. No, sir; they are standard terms.

The Court: Had there ever been any conversation between you and Turner that the celery was to be inspected by State or Federal agents at Gerber?

The Witness: No, definitely not. [97a]

Q. (By Mr. Haines): But you did have a conversation with Mr. Turner about the inspection at Lompoc?

A. We requested inspection at origin. That was the deal.

Mr. Haines: May I have the last question and answer read, please, your Honor?

The Court: Yes.

(The record was read.)

Q. (By Mr. Haines): Whom did you request the inspection of—Mr. Turner?

A. That was a part of the terms of the contract for sale.

Q. Now, you can answer that question, Mr. Nelson. Did you request that of Mr. Turner?

A. According to our operating procedure—

Q. Never mind your operating procedure. Just

(Testimony of Donald L. Nelson.)

answer the question. Did you request of Mr. Turner the inspection at Lompoc?

A. Undoubtedly, yes.

The Court: By that you mean you do not have any personal recollection of it?

The Witness: No.

The Court: You are relying on what your practice would have been?

The Witness: That's right. Our practice is uniform. [98]

Q. (By Mr. Haines): Did you have any discussion with Mr. Turner about an inspection at Seattle?

A. I don't recall. He was familiar with the terms of our contract, however.

Mr. Haines: I move that be stricken as not responsive and as an opinion and conclusion of the witness.

The Court: It may go out, that statement that he was familiar.

Q. (By Mr. Haines): Now, Mr. Nelson, did you have a conversation with either Mr. Turner or with the Mr. Nelson who was on the stand here this afternoon on Saturday, the 16th day of December, about canceling this shipment?

A. I don't recall any such cancellation.

Q. Do you recall talking to either Mr. Turner or Mr. Nelson, and telling one or the other of them that something had occurred and that you wanted to cancel the two carloads, and you were advised by

(Testimony of Donald L. Nelson.)

them it was too late, the celery had all been harvested?

A. No, sir, I do not recall that.

Q. You wouldn't say that you did not have such a conversation?

A. I said that I did not recall.

Mr. Grean: If your Honor please, I object.

The Court: Objection overruled.

Q. (By Mr. Haines): Do you recall any unusual situation [99] arising in reference to this particular purchase of celery? A. No, I don't.

Q. Did you ever purchase any other celery wrapped that way from California Vegetable Growers?

A. I don't recall whether we did or not.

Q. Did you ever purchase celery wrapped like that from anyone else? A. Oh, yes.

Q. Who was that, Mr. Nelson?

A. You mean in your immediate locality?

Q. Yes.

A. Juanita, or not—the name has escaped me up there—Rosemary or Oceana Packing Company. That is a fact.

Q. You are familiar with the fact that is not the usual practice—— A. That's right.

Q. ——of handling celery in commercial channels? A. That's right.

Q. Ordinarily it is loose packed?

A. That's right.

Q. The purpose of that is so that the celery gets ventilation; isn't that true?

(Testimony of Donald L. Nelson.)

A. The purpose of the wrap?

Q. The purpose of the loose wrap, the loose pack? [100]

A. Since you use liners a good deal of the time, I don't think that is the purpose of that.

Q. What do you mean by that, by "liners"?

A. The crate liner, the paper.

Q. That is one sheet between layers, is it not?

A. No, it completely encloses the pack.

Q. But it does not enclose each and every stalk?

A. That would be a protection to the stalk itself.

Q. What kind of paper do they use in the ordinary liner?

A. There are various kinds. They use a parchment or a wax paper.

The Court: By "liner" you mean a piece of paper that is inside of the pack and covers the bottom and the sides and the top?

The Witness: That is right.

The Court: And completely encloses the vegetable that is put in this lining?

The Witness: That's true.

The Court: Is the liner customarily used on a loose pack?

The Witness: There are some that use them and some that don't.

The Court: I see.

The Witness: It depends on the [101] individual.

Q. (By Mr. Haines): Now, so far as California Vegetable Growers is concerned, they furnished you

(Testimony of Donald L. Nelson.)

with the quantity of celery that you indicated in your negotiations? A. That's right.

Q. There was complete agreement as to the price of the celery? A. That's right.

Q. And the celery was handled exactly as you dictated it should be handled, so far as wire crated, wrapped—— A. Correct.

Q. ——shipping and icing? A. Correct.

Q. The ultimate destination of this celery was not Seattle, Mr. Nelson, was it? It was to go to Alaska?

A. The only destination we had was Seattle.

Q. Oh, now, wait a minute. You knew that the ultimate destination of this celery was not Seattle, it was Alaska?

A. At that time, naturally, security was still in effect. All we had was a code mark.

Q. You knew it was going on a boat at Seattle?

A. Yes.

Q. So you knew Seattle was not the ultimate destination; isn't that correct?

A. That's correct.

The Court: What difference does that [102] make?

Mr. Haines: It goes to this question of destination that the defendant is laying so much stress on.

The Court: You mean you are trying to prove now that the word "destination" used in Exhibit H, for instance, meant the ultimate destination other than Seattle?

Mr. Haines: No, your Honor. I am not trying

(Testimony of Donald L. Nelson.)

to prove that. I am simply trying to prove that the word "destination" is not narrowed down to the literal meaning of the final point of consumption. We contend "destination" is where title and possession and control took place. They contend it was some other point.

The Court: All right.

Mr. Haines: Their contention is that "destination" was a trans-shipping point.

The Court: All right. Proceed.

Mr. Haines: It also interprets the regulation that they have cited and depend upon when they talk about the necessity of inspection at destination. That is, as we stated in our argument, that is the very nub or the crux of this argument as to what is the meaning of the word "destination." It does not mean, according to the defendant's own contention, Seattle.

The Court: All right. Proceed. I get your point.

Mr. Haines: That is all.

The Court: You may step down, unless Mr. Grean wants [103] to ask you some questions.

Mr. Grean: You may step down.

(Witness excused.)

Mr. Haines: Now, your Honor, I would like to make one or two observations in reply to the renewed motion of counsel.

The Court: Now, he withdrew his motion because I permitted you to reopen your case. The status is you are still on your case. Do you now rest?

Mr. Haines: We rest.

Mr. Grean: At this time, your Honor, I will renew my motion under 41(b).

The Court: Mr. Grean, how long will it take you to put on your proof?

Mr. Grean: It will not take very long.

The Court: I am going to overrule your motion. This is not an open and shut proposition, but rather than spend time on the motion I would rather hear the proof. On appeal, on these motions of summary judgment, if the Circuit Court finds there should be some issue of fact to be decided by the court, and the court grants your motion for summary judgment, then you are in trouble. Rather than do that, we will go through this and find out whether there is merit to your case.

Mr. Grean: We will do that, if the court desires. I would like to make this statement, however, with regard to the [104] plaintiff's case: We have stipulated that the celery was purchased, that it was shipped, that it was inspected, that it was inspected again at destination, and there it was rejected.

The Court: I understand that.

Mr. Grean: There has been no showing of wrongful rejection. The certificates speak for themselves. The indication of the witness, the so-called expert witness of the plaintiff, has been to the effect that there are spores present which may germinate.

The Court: There is no showing of any oral agreement other than or different than the purchase orders.

Mr. Grean: That is true, your Honor, and for that reason I feel that the presentation of the defendant's case will rest merely upon a showing of the validity of the certificates of inspection, and as to what they mean.

Mr. Haines: I am constained to reply to at least two things counsel says. I think the trouble with counsel's argument is that his major premise is incorrect. The burden of proof is not upon us as to what occurred after they took possession, and that is the purport of the cases we have cited, and he hasn't cited any cases to the contrary. Under the Rivers Brothers case, and the other authorities we cited, our burden is met when we show that the goods were acceptable for export when he passed title to them and passed control [105] and possession.

The Court: I haven't read those cases, but I will wager those cases are cases in which there was not a contract which provided for a final inspection at some place of destination. In other words, you take the ordinary sales contract, where you don't have a written agreement but you have a sale of the goods, then I think the law is—and I am speaking off the cuff now, because I intend to read the cases before I decide this case, and I haven't had a chance to do that—in the ordinary case where you haven't a written agreement, I would apprehend the law to be when delivery is made, the sales are complete, and I apprehend that your cases are that kind of case; or where the goods are shipped from California and there is no real means for

inspection at some particular place, and maybe no chance for inspection until they arrive. But here is a case where, in the absence of an oral contract, the only contract I can rely upon is the written purchase orders, and that then becomes a question of law, as to what is meant by "Place of origin," and what is meant by "Place of destination," and what is meant by the phrase "Subject to inspection and acceptance at destination."

Mr. Haines: That is correct.

The Court: Now, it seems to me that the case is going to hinge pretty much on what that purchase order means. [106]

Mr. Haines: I think that the main thing that we are contending for, your Honor, is that we cannot be held responsible for something that happened or might have happened after it passed beyond our control.

The Court: If this does not mean what it says, if the statement "Inspection points—Inspection and acceptance at destination," if that means the government had the right to inspect and accept or reject at Seattle, then I don't think you can urge that point.

Mr. Haines: Oh, for instance, your Honor—

The Court: But if that means "Inspection and acceptance at Lompoc," according to one of your contentions, that Lompoc might be the place of destination because of the origin, taking your point on that score, or if under the law title passed to the government at Lompoc and the risk of the shipment was on the government in some way or other,

so that this phrase does not mean what it purports to mean, then maybe you have a point there.

Mr. Haines: Your Honor, what about a willful act on the part of the government, or if they deliberately let that celery stand for 61 hours on the track, with the doors open? Are we responsible for that?

The Court: I take it that every contract has an implied covenant of good faith. Every contract has an implied covenant of good faith, whether written in the contract or not. It is [107] implied. I take it, therefore, that the phrase "Inspection and acceptance at destination" would mean that there would be a good faith inspection and a good faith acceptance or rejection. I think, however, the burden of proving any lack of good faith would be on the plaintiff, if the defendant proves, and here it has been proved by the stipulation, that there was an inspection at Seattle. Doesn't that seem logical?

Mr. Haines: Well, I believe that it is correct so far as your Honor has gone, but I don't think it goes the entire way. I don't believe it gets down to what I see to be the fundamental point, and that is the burden of proof as to what happened after title and possession passed to the defendant.

The Court: Let's take the government's case. The government is going to contend that the contract says "Inspection and acceptance at Seattle." The government says they rejected it at Seattle. The fact they didn't put the proof on doesn't make any difference, because it is in the stipulation. It

seems to me if you contend there was a bad faith rejection or something was done deliberately by the government to make possible this inspection and rejection, the burden then shifts to you to prove it.

Mr. Haines: I use that merely as an example to show where the burden of proof lies. I just added the "willful act" as an example of the fact that you can't go all the way [108] and say that the burden is entirely upon the plaintiff all the way, and that he is responsible for the goods until they reach Seattle and until they are inspected there, and that because of that typed-in phrase "Inspection at destination," that that is all the government has to do, and that then they can sit down and from there on the plaintiff has to prove what happened to the goods, after we no longer controlled it. I say that from that point on the burden shifts to the government.

The Court: I have your point, and I intend to read your cases. Let's go ahead, Mr. Grean.

Mr. Grean: On that particular point, your Honor, does the plaintiff wish us to believe there is something mystical in the word "destination"? I can't follow their reasoning there.

The Court: Let's call your witnesses.

Mr. Grean: Mr. Stay, please.

PHILLIP V. STAY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Phillip V. Stay, S-t-a-y. [109]

Direct Examination

By Mr. Grean:

Q. What is your occupation, Mr. Stay?

A. At present I am assistant chief of the Bureau of Shipping Point Inspection, California Department of Agriculture.

Q. How long have you held that position?

A. Approximately 10 years.

Q. What was your occupation before that?

A. Well, I started in the inspection work as an inspector in June, 1924, and worked as an inspector, and as an inspector in charge, and supervising inspector, and to the position that I hold at present.

Q. During that period of time, Mr. Stay, have you had occasion to inspect celery? A. Yes.

Q. Have you had occasion to learn the proclivities of celery? A. Yes.

Q. What would you say would be the ideal temperature for storage or transportation of celery?

A. According to government holding tests and data, it would be in the middle thirties.

Q. What advantage or disadvantage is there in a parchment wrap of each individual stalk of celery?

(Testimony of Phillip V. Stay.)

A. I don't believe I could truthfully comment on that. To my knowledge, there have been no holding tests that would [110] show one method being superior to another.

Q. Isn't it true that celery purchased by the government and wrapped for export is wrapped in that manner because of the staying quality?

A. I presume that is the reason, because all of it is wrapped that is going for export.

Q. I show you a United States Department of Agriculture inspection certificate No. D-43243, and ask if you can see there——

The Court: What exhibit number is it? Give us the number for the record.

Q. (By Mr. Grean): Defendant's Exhibit No. E, and ask what condition that indicates with regard to the produce to which it relates?

A. This is rather difficult to read. It shows celery fresh, crisp, tops mostly green, some turning yellow to yellow. Blight ranges from 4 to 17% in many crates, averaging 6%. Decay irregular. Most crates ranges from 5 to 20%, averaging approximately 7%.

Q. Is that condition suitable for export?

A. I would think not.

Q. Is that condition within the tolerances permitted by the standard of the United States Department of Agriculture?

A. No, it is not.

Q. I now show you Defendant's Exhibit F, which pertains [111] to the same car, and is an inspection made on behalf of the plaintiff on De-

(Testimony of Phillip V. Stay.)

cember 26, 1946, approximately three days after this. I call your particular attention to temperature of product as related on December 26 in that inspection certificate.

A. This shows the temperature of the product in the bottom layer 33 degrees; top layer 35 degrees Fahrenheit.

Q. Is that favorable storage temperature for celery? A. Yes.

Q. Would you say it was the most favorable?

A. Yes. This is in the middle thirties. I would say it was most favorable.

Q. I now ask you to refer to the inspection certificate made at point of origin on the same car. Will you please read—before you do that, while I am doing this, will you please read the condition report at that time on that last certificate?

A. "Stock free from decay, is fresh and crisp. Tops mostly green, few turning yellow. Damage from discoloration following bruising averages 1%. Decay in tops ranges from 8% to 35%, averages approximately 20%, chiefly bacterial soft rot, mostly in initial stages, many advanced. In many stalks decay in tops is following blight. Decay in lower main branches ranges in most samples from 4% to 12%, in some samples none, and averages 5% chiefly watery soft rot, mostly [112] in initial stages."

Q. I now ask you this question: Admitting that there was no decay on December 23rd—I beg your pardon—on December 14th, at the time this particular car was shipped, December 14th or 16th,

(Testimony of Phillip V. Stay.)

that the icing conditions were ideal, that it arrived on schedule, December 23rd, how do you account for the failure of the celery to pass condition by reason of decay, with reference, Mr. Stay, to the watery soft rot or bacterial soft rot which is mentioned therein?

A. Well, this can be explained by the fact that the bacterial soft rot and the watery soft rot are secondary attacks of the organism following blight and bruises or any puncture of the epidermis of the leaves or the branches of celery. These types of decay need some mode of entrance other than on healthy tissue.

Q. Is it possible for that stage of the decay to carry to that extent under ideal icing conditions and an inspection at origin showing no decay?

A. We have had several in the course of years that would be as bad or worse.

The Court: In other words, your testimony is that this kind of decay can develop even when the car is properly iced?

The Witness: That is right.

The Court: It is a decay that progresses [113] under temperatures of 30, 33, 35 degrees?

The Witness: It will, yes.

The Court: Of course, I take it, it will increase much faster and to a greater extent under higher temperatures?

The Witness: That's right.

The Court: That is not true in most ordinary types of decay, is it? They won't ordinarily de-

(Testimony of Phillip V. Stay.)

velop under those cool temperatures, or will they?
I don't know.

The Witness: Well, of course, they all develop more rapidly under temperatures of 65 degrees or warmer, but celery, or any commodity leafy in nature, that is shipped under refrigeration in the crates as well as over the top of the load in the car, the temperatures will always be, it is safe to say, below your forties, and decay does develop in a good many types of commodities that are leafy in nature.

The Court: Including celery?

The Witness: Including celery.

The Court: All right.

The Witness: Now, in celery you have this late blight condition, and I presume this is late blight, that is not discernible at shipping point. In other words, all that would be present in the leaves or on the branches would be very small floating bodies that we call ptenidia; they are not, unless they are there in great enough numbers on a given spore, they are not discernible to the eye. [114]

Now, these infections, and the growing of the lesions takes place very rapidly, and when the tissue is broken down, then you have ready entrance for this bacterial soft rot and watery soft rot, which is a secondary condition.

The Court: All right. Go ahead, Mr. Grean.

Q. (By Mr. Grean): I will read you a statement from the United States Department of Agriculture Miscellaneous Publication No. 40, entitled

(Testimony of Phillip V. Stay.)

“Market Diseases of Fruits and Vegetables,” in which it says, in referring to watery soft rot, at page 58:

“Decay may be expected to develop in transit or storage in celery or other vegetable crops harvested from fields in which the sclerotinia disease was an important factor”——

which is referred to as the disease of watery soft rot,

——“even though they appeared to be free of decay at the time of harvest. Each of the species of sclerotinia has wide temperature range for growth and for production of decay. Infection may occur at temperatures as low as 32 degrees to 34 degrees, and as high as 82 degrees, with an optimum 70 degrees to 78 degrees.”

Does that bear out just what you said in regard——

A. That bears out the statement I just made.

Mr. Grean: That is all. [115]

Cross-Examination

By Mr. Haines:

Q. What type of bacteria do you designate this as? What was the origin of that?

A. Well, this bacterial soft rot can be any of the bacterial-carrying bodies, which is the result of a secondary infection. The bacteria is present in the soil and in the water, and in the wash water, and may develop in transit.

(Testimony of Phillip V. Stay.)

Q. Well, is it some type of blight, or does it come from blight?

A. Oh, no; no. This blight that we speak of in California, so far as we know we have two principal types of blight, and one is called Early Blight and one is called Late Blight. They are both fungus, they are not bacteria, and they can cause injury to your healthy tissue under the right atmospheric conditions, and when this fungus breaks down the tissue, then this secondary bacteria can start.

The Court: And cause the rot?

The Witness: And cause the rot.

Q. (By Mr. Haines): This so-called watery soft rot, that is the result of the bacterial condition rather than blight condition; is that your opinion?

A. Well, bacterial ooze or watery soft rot, to the growers and to the trade is commonly known as pink rot, because of its color. It is a field [116] disease.

Q. And that is what was present here, in your opinion, what you call a field disease?

A. Well, yes. Its early inception is in the field. The spores can be on perfectly healthy plants and not be discernible to the eye.

Q. In other words, it comes right out of the ground?

A. It carries in the soil and through water, through the handling of the celery in harvest. For instance, the laborers that you have in the field cutting the celery from its roots, if they handle

(Testimony of Phillip V. Stay.)

stalks that are infected with watery soft rot and they get it on their cutting instrument or on their tools, or on their hands, they can spread that all through the celery. Also, if a plant goes through your washing machine that has watery soft rot, naturally, the spores are spread through your wash water.

Q. Now, suppose that you had a plot of celery consisting of 11 acres, and there was produced from that celery 11 carloads of celery over a period from the second day of December to the 19th day of December. What would your explanation be of why 8 of those 11 carloads were entirely free from this disease you talk about, and 3 of them had the disease? They were all grown in the same plot, they were harvested by the same crew, and go through the same packing shed.

A. Well, insofar as these field diseases are concerned, because of the presence of that disease in the field, it does [117] not mean it is widespread throughout the field. Watery soft rot usually starts in a portion of the field that may be not level, and where the water stands, and also at the ends of the rows, at which you make your turns for your cultivation, and those plants at the ends of the rows are more subject to mechanical injury during the growing process than are the plants in the middle of the field. Therefore, because of the fact that you have watery soft rot in the first row, it does not mean you have watery soft rot on every plant

(Testimony of Phillip V. Stay.)

through that particular row or through the field. It can be spotted, in other words.

Q. Don't you think it rather unusual that you would have a cutting from this same rather small plot—11 acres isn't a very large plot, is it, so far as the vegetable industry is concerned—you had cuttings of 300 crates on the 9th, 450 of the 10th, 20 on the 11th, 365 again on the 11th, 450 on the 12th, 225 on the 12th, and 50 on the 13th, and then we come to the celery that we have here in question, which was cut on the 14th and the 16th. Then we have 200 crates that were cut and processed from the same field and processed in the same packing shed on the 17th; 225 on the 17th; 38 more on the 17th; 8 more on the 17th; 121 on the 18th; 75 more on the 18th; 33 on the 18th; and 5 on the 19th; and in none of those other batches of celery was there any indication of this disease being [118] present.

Mr. Grean: If the court please, we don't know just how long they were in transit.

The Court: And have you got any proof that there was no soft rot found in these other 8 carloads?

Mr. Haines: Our witness testified there was absolutely no complaint in reference to any of the others.

The Court: What relation does that have? Is there any proof whether they were shipped, sold on the local market, or shipped to Los Angeles?

Mr. Haines: Yes. His testimony was that one carload went to the Army, to Chicago, that par-

(Testimony of Phillip V. Stay.)

ticular one, and some went out on the 13th, the very day this agreement was entered into. He testified it takes a day longer to go to Chicago than it does to go to Washington, to Seattle, Washington. The shipments in the other cases were to Cleveland, Omaha, San Diego, Pittsburgh, St. Louis, Omaha, Detroit, Aberdeen, Houston, New York, Chicago, Houston, Los Angeles, Vancouver, San Diego and Los Angeles.

Don't you think it rather peculiar that this one segregation of celery should have this disease when they all had the same origin and the same type of handling?

The Witness: Well, if the others had none, I would say it was out of the ordinary.

Q. (By Mr. Haines): And when you had celery both before and after from the same plot, packed in the same shed by the [119] same crew?

A. Well, may I explain?

Q. Yes, we are asking for an explanation.

A. Well, I don't know. Here, your Honor has asked me to make testimony here. I don't know what the condition was on those other crates that left. Probably they were acceptable, as far as the Army was concerned, in Chicago for the particular purpose they had it there for, and it may have had decay. I can't draw any conclusions.

The Court: Well, he is asking you to assume for argument that the other shipments had none.

The Witness: If the other shipments had none, then I would say it was out of the ordinary.

(Testimony of Phillip V. Stay.)

Q. (By Mr. Haines): Now, have you any other explanation than what you gave as to why this condition existed?

A. No, I don't think I have.

Q. Suppose this trip took one day longer than it normally does to go to Seattle, and suppose during that extra day the doors were left standing open for, say, six or seven hours, would that have affected it?

A. Certainly, it would have affected it, but at that time of the year—wasn't this in December?

Q. Yes.

A. —I doubt whether that would have much effect in that part of the country at that time of the year. It was [120] probably cooler outside than inside the car, maybe in those days. What I mean to say, the outside temperature at that time of the year in that region—

Q. We don't know what the temperature was.

A. No, we don't.

Q. It could have been an unseasonably hot spell.

The Court: That is all speculation.

Mr. Haines: Yes, it is all speculation.

The Witness: That is right.

Q. (By Mr. Haines): You do know, as an inspector, it takes six days ordinarily for goods to travel from Santa Barbara and vicinity to Seattle, do you not?

A. I don't know what the delivery dates are at all by railroad.

Q. What would be the effect upon this celery in

(Testimony of Phillip V. Stay.)

the event that there was a warm condition, if it was tightly sealed in parchment paper, which was non-porous in nature, and each stalk was sealed that way?

A. You want me to comment on that?

Q. Yes.

A. Well, in the first place, your stalks are not tightly sealed. They are open at both ends.

Q. Well, is this true, that they are open at both ends when they are put into a wire crate, such as has been described here, and then the both ends of the parchment [121] which laps over the ends of the stalks are crushed down?

A. Well, it probably won't open to the extent that it would be if it was a single stalk, but the wrapping of the individual parchment does not entirely seal the individual stalk. That is my point. As I said before, I don't know the relative merits of individually wrapping celery and the non-icing of celery, as to its carrying qualities. However, at the time there is considerable purchasing being done which has less ventilation than this parchment wrap that you speak of, and that is called a pliofilm envelope, which has small air holes through the bag, and others are completely sealed, and that is known as a consumer package and is being received quite favorably at the present time under commercial packing. It is done a good deal, and that is far more restrictive, in so far as enclosing the individual stalk is concerned, over your parchment wrap.

Mr. Haines: That is all.

Mr. Grean: Will counsel stipulate that further

testimony from this witness will be substantially the same as to the other two cars with regard to the inspection certificates?

Mr. Haines: Oh, yes; yes.

Mr. Grean: Step down.

The Court: You may step down.

(Witness excused.)

The Court: Are the other witnesses [122] cumulative?

Mr. Grean: Yes. I have other witnesses who were contracting officers at the time in the office and will testify to the use of the purchasing order, if the court wishes testimony on that point.

Mr. Haines: Isn't that a matter of law, your Honor?

The Court: I think so.

Mr. Grean: In that event, the testimony of the other witnesses is cumulative as to the interpretation of the inspection reports, with regard to the government standards.

The Court: All right. That is the defendant's case?

Mr. Grean: That is the defendant's case, your Honor.

The Court: Do you want to summarize your points briefly, or do you want to submit it as is?

Mr. Haines: I think we would prefer to submit it with possibly an opportunity to submit more authorities, particularly on that one point which seems to——

The Court: How much time would you want to submit additional authorities? A week?

Mr. Haines: 10 days, your Honor.

The Court: Can we do it more promptly, so I won't forget about the case before I decide it?

Mr. McIntyre: Certainly. We will do it in any time the court says.

The Court: I don't know whether I will need more authorities after I get through reading your briefs. [123]

Mr. Haines: We would want to submit more authorities on the question of the burden of proof, what happened after the change of position and title.

The Court: May I see the exhibits, Mr. Clerk? I will give you permission to file a limited memorandum on certain topics when I get through discussing this matter.

I am going to take the matter under submission and restudy your memorandums and read some of these cases in more detail. But we have here a case in which the plaintiff is suing upon a contract, a breach of contract, and from the allegations of the complaint there has been alleged an oral understanding and agreement arrived at between the plaintiff and the defendant at Guadalupe, California. The plaintiff has offered no evidence of that oral agreement, although the court gave the plaintiff an opportunity to do so, and it reopened its case.

The court is of the opinion that the law cited by the defendant is correct, namely, that contracts with the government must be in writing or must

come within the other exceptions; that where there is an oral order or requisition, then the purchase order becomes the contract, and, I take it, therefore, that the contracts before the court and, in substance, the contracts sued upon are the contracts, Exhibits G, H, and I, being the purchase orders for the three carloads of celery.

Now, had the plaintiff proved what I understood it [124] contended in some of its arguments, namely, there was one oral agreement reached, and subsequently these purchase orders did not reflect the oral meetings of the minds, we might have a different situation. We do not have that point because there was no proof made of what the oral agreement was, and although the purchase orders, Exhibits G, H, and I, were not typed up until December 21st, long after the celery was shipped, there is no proof before the court that they in any way varied from whatever oral agreement was entered into at the time the oral request was made for bids, and the bids were submitted. I have to assume therefore, that the purchase orders truly reflected the contract between the parties.

We then, I think, have solely questions of law in this case. There is no dispute but what the celery arrived in Seattle in a partially decayed condition. No dispute about that. There is no dispute but that the celery was all right when it was shipped, and the court will make a finding at this time that the celery passed inspection O. K. at Lompoc. The court will also find that the celery did not pass inspection at Seattle, and was rejected.

I think, therefore, we have solely questions of law, as to the meaning of the purchase orders which were the contracts; in other words, what is meant by "delivery F.O.B. origin," and what is meant by that term in connection with "Inspection Points—Inspection and Acceptance at Destination." [125] What is the destination? Seattle? Or is it Camp Richardson, as shown in one of these orders, or is it Camp Ladd, as shown in another, or is it Richardson, Ladd, and Nome, as shown in the third? Or is it Lompoc?

Now, the court is going to find that the government had a right under the purchase order, in the express language of the purchase order, to inspect and accept or reject at destination. I think one of the legal problems is: What is destination? If destination is Lompoc, then the government accepted it, and the government had exercised then its right to inspect and reject, and not having rejected, it was the government's celery. But if "destination" means Seattle, then I think the contract is clear on its face, that it gave the government the right to inspect and accept or reject at Seattle.

Now, it seems to me that is the rather narrow question the thing boils itself down to. The second cause of action I thought first might be of some interest to us, but there is no allegation that the government received the goods. It is not a common count for money had and received.

Mr. Haines: That is correct, your Honor.

The Court: The facts without dispute show the goods were sold by the shipper for the freight

charges, plus a few dollars, I think \$500 in addition.

Mr. Haines: That is correct. [126]

The Court: One other point that may or may not enter into the case is on this matter of the burden of proof, and it depends somewhat on how the court interprets this contract. I am inclined to think that the interpretation of the contract will obviate any discussion of this matter of burden of proof. But if we did get into the burden of proof matter, it seems to me that the plaintiff makes its prima facie case by showing that the goods were shipped, were inspected at Lompoc and passed inspection. The government then relies for its defense on the ground that it exercised its right of rejection at Seattle. Having exercised its right of rejection at Seattle, which under that interpretation of the contract it had the right to do, if there was any contention that the government was in bad faith or that the government was at fault in some way, it seems to me the burden shifts again to the plaintiff to prove that issue. There is an implied covenant of good faith, that each party to a contract must exercise its rights in good faith. Now, the government's right to inspection and rejection would not be a right to make a false inspection, would not be a right to say it had inspected when it had not, would not be a right to inspect and reject without cause. But if we ever reach that point in the case, I think clearly the burden of proof is on the plaintiff to go forward, if it says the government has exercised its right to inspection and acceptance, and since the [127] plaintiff has not gone forward with

that proof, the court cannot speculate as to what might have happened, the court can't speculate as to whether any doors might have been open, and the court can't speculate as to whether it stood out in the sun for a day. I think, having talked about it out loud, the thing comes down solely to a question of the interpretation of those three documents. Exhibits G, H, and I, and what they mean on their face.

Mr. McIntyre: May I be heard just a moment on that question of the burden of proof, if the court please?

The Court: Yes.

Mr. McIntyre: Our argument is based on several authorities which hold that an inspection made at destination, where the buyer has employed the shipper, the carrier, and the carrier is acting under the directions and control of the buyer, it is limited to an inspection at destination, but that destination inspection must determine the condition at point of origin, and whether or not there was anything inherent in the shipment at point of origin which existed at that time or existed to an extent that would have caused the damage by the time it reached destination.

Now, I think that applies equally whether the provision of the contract is express or implied. And if it is just an implied provision, it is just as much a contract.

The Court: I will read your cases on that [128] point.

Mr. McIntyre: Yes, sir.

The Court: Although I think under the facts of this case there is no dispute but whatever caused this decay was wrapped up inside of the parchment at the time the celery passed inspection at Lompoc. In other words, I don't think that anybody can contend that something got inside the parchment.

Mr. McIntyre: No. I think the testimony of our witness is that any celery contains spores and germs.

The Court: Which decay.

Mr. McIntyre: Which decay, yes.

The Court: Now, I have tried to narrow down what I think the issues are. I am sympathetic to your position in the sense that I hate to say a person who has grown celery and purportedly sold it to the government should not get his pay. On the other hand, I can see the government's position, that if the celery was to go to Alaska and had been specially wrapped, if it could not send this celery to Alaska, and I am not sure, with that amount of decay at this time——

Mr. McIntyre: We concede it at this time.

The Court: ——so that when it got to Alaska they would have to pump out the bilge to get rid of it.

Mr. McIntyre: That is quite true. Our particular point in wishing to pass this question of the burden of proof is that actually we passed possession and control to the government [129] and we are virtually helpless.

The Court: I will give the plaintiff a week to

submit any authorities it wants to on, say, those three points:

One, what do the contracts mean, Exhibits G, H, and I, which are the only contracts we have;

Two, what about the burden of proof; and,

Three, if it is a different point and not included in the others, did title pass to the government at Lompoc—did the title and risk pass to the government at Lompoc?

Mr. McIntyre: I think it is conceded that title passed, but it is narrower than that, did risk pass?

The Court: Did risk pass at Lompoc?

Mr. McIntyre: I think that is very clear.

The Court: I will give you a week, if you desire to reply, Mr. Grean.

The matter will be submitted.

Mr. Grean: Copies to be served on counsel?

The Court: Oh, yes, between counsel, and an original and a copy to the court. Then if you want to reply after you have seen Mr. Grean's brief, you can have another five days to make your reply.

Now, don't write any briefs if you have covered it here.

Mr. McIntyre: I will not burden the court.

The Court: Don't repeat yourselves on points you have already covered. I will try to read the cases you have already [130] cited and consider them before arriving at a decision. I want to thank you for your expeditious manner in getting this matter disposed of.

Your motion for summary judgment is denied, and I am going to rule on the matter on the merits.

which I think is more satisfactory in this kind of case. [131]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 30th day of April, A.D. 1951.

/s/ MARIE G. ZELLNER,

/s/ SAMUEL GOLDSTEIN,

Official Reporters. . .

[Endorsed]: Filed May 4, 1951. [132]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 56, inclusive, contain the original Complaint; Answer; Stipulation of Facts; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal and Appellant's and Appellee's Designations of Record on Appeal, and a full, true and correct copy of minute order entered March 16, 1951, which, together with original reporter's transcript of proceedings on March 6, 1951, and original plaintiff's Exhibits 1 to 6, inclusive, and original defendant's Exhibits A to M, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23rd day of May, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12947. United States Court of Appeals for the Ninth Circuit. California Vegetable Growers, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 24, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 12947

CALIFORNIA VEGETABLE GROWERS, a Cor-
poration,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

A. There is but one point on appeal in this case. It may, however, be stated in different ways.

1. Where title to a perishable commodity passes at origin of shipment and delivery is made at point of origin to the carrier as agent of the buyer by the seller; and at the point of destination the buyer finds the commodity below the specifications of his order, may the buyer reject the shipment where the seller proves the commodity to be in accordance with the order at the point of origin?

2. Where inspection is made by the seller of a perishable commodity at the point of destination of shipment, where the seller delivered the commodity F.O.B. cars at points of origin, and the buyer finds the commodity below the standard ordered and the seller proves delivery F.O.B. cars to be in accordance with the order, upon whom does

the burden of proof devolve to establish the cause of deterioration during shipment?

3. Where the buyer of a perishable commodity, delivered to it F.O.B. cars for distant shipment, inspects the commodity at destination, must the buyer's inspection relate to condition at the date of delivery or at the date of arrival at destination?

B. The facts are not in dispute. Celery was sold to the Army of the United States by plaintiff, the purchase orders called for delivery to defendant F.O.B. cars at Lompoc in Santa Barbara County, California, on private bill of lading to be converted to government bill of lading at destination, Seattle, Washington. The purchase order called for inspection and acceptance at destination. The celery conformed to specifications at point of origin, Lompoc, but had deteriorated by the time it reached Seattle. No adequate explanation was offered by either party for the deterioration on trial of the action. The question to be determined on this appeal is purely one of law. The essential evidence being the purchase orders, the stipulation of facts entered into by the parties and the inspection reports at Lompoc and Seattle respectively.

Dated: May 29, 1951.

SCHAUER, RYON &
McMAHON,

ALFRED D. HAINES,
ROBERT W. McINTYRE,

By /s/ ROBERT W. McINTYRE.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 31, 1951.

No. 12947

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA VEGETABLE GROWERS, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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No. 12947
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CALIFORNIA VEGETABLE GROWERS, a corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

I.

STATEMENT OF JURISDICTION.

A. Pleadings.

1. COMPLAINT by Appellant against the United States of America for the purchase price of celery sold and delivered to Quartermaster Corps of the United States Army. [Tr. p. 3.]
2. ANSWER of the United States of America setting up rejection for failure to meet specifications. [Tr. p. 7.]

B. Statutory Provisions Upon Which Jurisdiction of United States Courts Are Founded.

1. Title 28, Section 1346(a) (2) U. S. C. A.

C. Facts Upon Which Jurisdiction Is Based.

1. Appellant has its principal place of business within the southern district of California and the celery, the subject of this action, was delivered to Appellee within said district. [Tr. p. 38; 31, 32 and 33.]

II.

STATEMENT OF THE CASE.

A. Statement of Facts.

The facts in this case are not in dispute. The pertinent facts are as follows: The Quartermaster's Corps advertised for bids for celery and Appellant submitted bids for three car loads at \$2.30 per crate, which bids were accepted and a purchase order duly issued to Appellant by the contracting officer at the Quartermaster Market Center at Los Angeles for each car. [Tr. pp. 14, 31, 32, 33 and 39.] The celery was packed and loaded on the cars by Appellant in accordance with the specifications in the purchase orders [Tr. pp. 129, 130, 131, 20, 21 and 22] at Lompoc, California, which was the point of origin of shipment. The purchase orders call for delivery F. O. B. Guadalupe, actual loading took place at Lompoc, a nearby town, a point satisfactory to Appellee. The celery was inspected at Lompoc at the time of delivery to the carrier and was found to be in the condition and grade called for by the purchase orders and packed and iced in accordance with the specifications set forth in the purchase orders. [Tr. pp. 129 to 131 and 20, 21 and 22.] After packing inspection and loading, car number P. F. E. 45854 left Lompoc on the 14th of December 1946, and arrived at Seattle, Washington, on the 21st day of December 1946. [Tr. p. 16.] Car number P. F. E. 41017 left Lompoc on the 16th day of December 1946, and arrived at Seattle, Washington, on the 23rd day of December 1946. [Tr. p. 16.] Car number S. F. R. D. 3086 left Lompoc on December 16, 1946, and arrived at Seattle, Washington, on December 23, 1946. [Tr. p. 16.] On December 24, 1946, the celery in car number P. F. E. 41017 was inspected by Appellee at Seattle,

Washington, and was found to have deteriorated below the standard ordered. [Tr. pp. 17 and 27.] On December 23, 1946, the celery in car number P. F. E. 45854 was inspected by Appellee at Seattle, Washington, and found to have deteriorated below the standard ordered. [Tr. pp. 18 and 29.] The celery in car number S. F. R. D. 3086 was inspected by Appellee at Seattle, Washington, on December 24, 1946, and found to be below the grade ordered. [Tr. pp. 16, 17 and 25.] Upon the inspections in Seattle, Appellee rejected the celery and refused to take delivery or pay for the same. Appellant thereupon proceeded to sell the celery on the open market to mitigate damages, receiving \$591.02 over and above freight charges. [Tr. p. 18.] The total bid price for the three cars of celery was \$3,427.00. [Tr. p. 14.] Appellant brought this action for \$2,835.98, the difference between the \$591.00 received and the contract price. The shipments were made on commercial bills of lading to be converted to Government bills of lading at destination. [Tr. p. 9.]

B. Questions Involved in This Appeal and the Manner in Which They Arise.

1. There is no dispute in respect to the facts in this case and there is but one principal question involved in this appeal. This question is a pure question of Sales Law which may be stated as follows: "Where a seller delivers a perishable commodity to the buyer F. O. B. cars at point or origin of shipment and the buyer in-

spects at destination of shipment, must the inspection at destination relate to the time of delivery at origin or to the time of arrival at destination?" To state the question another way, "where seller delivers to buyer F. O. B. cars at point of origin of shipment, upon whom is the risk of loss during shipment?" From a trial standpoint the question might be stated, "where the seller delivers to the buyer F. O. B. cars at point of origin of shipment and the perishables delivered are in accordance with the contract of purchase, but upon arrival at destination the commodity is found to have deteriorated below the quality ordered, upon whom is the burden of proof in relation to establishing the cause of deterioration?"

In this cause the celery was admittedly up to the standard ordered when delivered to the Government at Lompoc F. O. B. cars. Thereafter, seven to nine days later, it was inspected at Seattle, Washington, and found to have deteriorated slightly below the standard specified in the purchase orders. The period in transit is a blank insofar as the evidence is concerned. Neither party could account for the deterioration and neither party had any information relating to what happened to the celery during the seven to nine day shipment period. All that is known is that four to seven percent rot was present when the celery was inspected at Seattle and no rot was present when the celery was packed and loaded at Lompoc. In the light of this situation the trial court held that Appellant had not complied with the contract and was not entitled to judgment.

III.

SPECIFICATION OF ERRORS.

A. The Trial Court Erred in Determining Under the Admitted Facts That Appellant Did Not Comply With the Contracts Evidenced by the Purchase Orders.

As before stated the celery was admittedly young, fresh and above the standard of U. S. No. 1 when delivered to Appellee F. O. B. cars at Lompoc. The deterioration occurred after delivery and neither party could explain by the evidence why rot developed. The court therefore erred in not rendering judgment for Appellant.

B. The Findings of the Court Are in Some Respects Inadequate.

1. The court failed to find that the purchase orders called for delivery to Appellee F. O. B. origin.

2. The court failed to find that the celery was delivered to Appellee at Lompoc F. O. B. cars in accordance with the terms of the contract.

3. The court failed to find that the rot developed after delivery to Appellee at Lompoc F. O. B. cars.

4. The court failed to find that title passed to Appellee at the time delivery was made F. O. B. cars at Lompoc.

IV. ARGUMENT.

1. Facts.

There is no dispute or argument in respect to the terms of the contracts evidenced by the purchase orders or the facts relating to performance by Appellant.

The purchase orders [Tr. pp. 31, 32 and 33] call for three carloads of eighty-eight percent U. S. No. 1 celery packed according to specifications. The portions of the purchase orders which control in respect to this appeal read as follows:

“In accordance with your.....oral quotation..... of 13 December 1946, please furnish the following on the terms specified on both sides of the page and on the attached sheets including delivery F. O. B. origin.

“Methods of presenting invoices or vouchers and of packing, marking and shipping shall be as provided herein except as otherwise directed by the contracting officer. Ship on com'l B/L to be converted to Govt. B/L at destination.”

“Inspection points—inspection and acceptance at destination.”

The purchase orders perhaps do not call for inspection at point of delivery, however, Appellee did cause an inspection to be made at the place and time of delivery to it, F. O. B. cars at Lompoc by Appellant. The inspection reports are in evidence. [Tr. pp. 20, 21 and 22.] They show the celery to be eighty-eight percent U. S. No. 1 without decay and in accordance with the specifications set forth in the purchase orders.

2. Law Applicable.

a. Where the contract provides for delivery F. O. B. point of shipment, title passes to buyer unless a contrary intention appears.

Southern Pacific Co. v. Hyman Michaels Co., 63 Cal. App. 2d 757, 147 P. 2d 692;

Planters Oil Mill and Gin Co., v. A. K. Burrow Co., 10 F. 2d 312;

Higgins v. California Prune and Apricot Growers, 16 F. 2d 199, *Certiorari* denied 273 U. S. 781, 71 L. Ed. 889, 47 S. Ct. 460;

Lord v. Edwards, 148 Mass. 476, 20 N. E. 161;

Louisville & N. R. Co. v. United States, 267 U. S. 395, 69 L. Ed. 678, 45 S. Ct. 233;

Illinois C. R. Co. v. United States, 265 U. S. 209, 68 L. Ed. 983, 44 S. Ct. 485, 46 *Am. Jur.* 605, Sec. 440, 46 *Am. Jur.* 608, Sec. 442.

b. The reservation of the right to inspect at a point other than the point of delivery F. O. B. carrier does not prevent passage of title.

Louisville & N. R. Co. v. United States, 267 U. S. 395, 69 L. Ed. 678, 45 S. Ct. 233;

Illinois C. R. Co. v. United States, 265 U. S. 209, 68 L. Ed. 983, 44 S. Ct. 485;

Delaware L. & W. R. Co. v. United States, 231 U. S. 263, 58 L. Ed. 269, 34 S. Ct. 65;

Pray v. Tower Lumber Co., 101 Cal. App. 482, 281 Pac. 1036, 46 *Am. Jur.* 610 pp. 443-444;

Williston on Sales, Revised Edition, Vol. II, p. 98, section 280b, p. 29, section 269.

Williston at page 29 of Volume II of his revised work on sales, states the law as follows:

“ . . . The goods may be identified but, nevertheless, subject to the approval of a third person and in that case the property will not pass without such approval; but the fact that the buyer has a right of inspection before being required to accept the goods should not affect the usual presumption applicable to the transfer of the property. To hold otherwise would habitually destroy the effect of these presumptions, for the buyer always has this right of inspection unless the terms of the contract were inconsistent with such a right, or the buyer has waived it.”

Again at page 8 Volume III of *Williston On Sales* (revised edition) it is said:

“The common illustration of this principle is where goods are shipped by a carrier in accordance with an order or contract. As has been seen, the property passes in such a case to the buyer on shipment, if the authority given by the order or contract is observed. It is often said in such cases that delivery to the carrier is a delivery to the buyer. Indeed, it is so provided in the Sales Act, and it may be urged that the buyer should exercise his right of inspection before such delivery to him, and that if he fails to do so, he waives his right; but whether or not the buyer is entitled to inspect the goods at the point of shipment, it is clear that the delivery to the carrier and the transfer of the property thereby to the buyer do not preclude a right of examination when the goods reach their destination (unless the contract expressly provides for inspection on shipment) although it is equally clear that if the goods were shipped in conformity with the contract or order, the risk of loss and other incidents of ownership during the transit

fall upon the buyer; so that if the goods are lost in transit, the right of inspection is lost. The principle applicable to the case of goods shipped by a carrier is also applicable where, for any reason, the property passes in uninspected goods before delivery.

“It is often said without due reflection that when goods are shipped in attempted fulfillment of an order or contract, that if the goods are not of the specified quality, the property passes to the buyer on delivery of the goods to the carrier, but that the buyer, on examining them, may rescind the sale. This, however, seems inaccurate. The seller is authorized to appropriate to the buyer only such goods as the offer or contract indicates.”

In *Standard Casing Co. v. California Casing Co.*, 233 N. Y. 413, 135 N. E. 834, the court aptly states the rule as follows:

(The right of inspection) “. . . Whether expressed or implied, does not change the incidence of the risk. Title passes upon shipment, though subject to the right of rescission upon the discovery of defects.”

c. The right to inspect at destination reserved by the contract was probably waived by inspection at point of shipment; however, the point is academic for the reason that inspection at destination must relate to condition at time of origin of shipment.

There are several cases directly in point in respect to the time an inspection for condition must relate where shipment is made F. O. B origin with the right reserved to inspect at destination.

Rinelli v. Rubio, (Ind.) 120 N. E. 388.

At page 389 the court says:

“1. The general rule seems to be that, where goods are sold by description and the buyer has not had an opportunity of inspecting the goods, they must not only, in fact, answer the description, but must also be salable or merchantable under that description. (Cases cited.)

“2. The question then arises: At what time and place should the inquiry as to merchantability be directed? Manifestly, under the contract in suit it should be directed to the time and place of delivery to the carrier, and the court should have instructed the jury clearly on this point. Apples are perishable goods. In the sale of perishable property there is no implied warranty that it will continue sound or merchantable for a definite period, or any period after delivery.” (Cases cited.)

Whittaker v. Dunlap-Morgan Co. 44 Cal. App. 140, 186 Pac. 181.

In this case the court says:

“ . . . The agent purchased the hay for delivery ‘f. o. b.’ McFarland. This term is one that has such a common commercial signification that the courts take notice of its meaning, generally without proof. ‘In many mercantile contracts it is stipulated that the vendor shall deliver the goods “f. o. b.” *i. e.*, “free on board.” The meaning of these words is that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped, and the goods are at the risk of the buyer from the time when they are put on board.’ *Benjamin on Sales* (7th Ed.) § 682. ‘If, therefore, the contract provides that goods are to be delivered f. o. b. at point of shipment, the presumption that the prop-

erty is to pass then is applicable.' *Williston on Sales*, § 280. Notwithstanding that title to the hay passed at the time the loading on cars at McFarland was completed, the transaction might still have been subject to rescission by a showing that after inspection at Los Angeles the hay was determined not to have been in a marketable condition at the time of shipment." (Emphasis ours.)

Mette & Kanne Distilling Co. v. Lowrey, (Mont.) 101 Pac. 966 at page 968 the court says:

"2. The evidence on the part of the plaintiff tended to show that the shipment was strictly in compliance with the order. Defendant, in order to rebut this *prima facie* case, was permitted, over plaintiff's objection, to introduce evidence tending to show: That the barrels containing the whiskey were received apparently in the same condition as when shipped; that they were put into defendants' cellar and properly stored; that the cellar was kept locked so that no person but the proprietors, King and Lowrey, and their employes, could have access to them; that, after they remained there long enough to allow the whiskey to get into condition for use, they were opened, whereupon it was found that they contained an adulterated liquor of a quality entirely different from Meadeville rye whiskey; and that the adulteration could not have been accomplished except at some place where there were facilities for that purpose. This evidence also tended to show that the barrels had not been tampered with after they reached the cellar. All of it was objected to on the ground that it was immaterial and irrelevant, in that it did not tend in any way to show that the plaintiff had not shipped the quality of whiskey ordered. The objection was properly overruled. The quality of

the whiskey when it was received was evidence of its quality at the time of its shipment; the proof on this point being materially aided by the fact that the barrels had not thereafter been tampered with while in charge of the carrier or after their arrival in Butte, as well as by the additional fact that the contents had not been adulterated as they were found to have been after their receipt in Butte.”

(Emphasis ours.)

Skinner v. Jones Griffiths & Sons, (Wash.) 141 Pac. 693;

California Vegetable & Fruit Co., v. Lane, (Mich.) 242 N. W. 792;

Mobile Fruit & Trading Co. v. McGuire, (Minn.) 83 N. W. 833.

d. Any question relating to intent in respect to the time of passage of title to the celery is concluded by the provision of the purchase order requiring the commercial bill of lading to be converted to government bill of lading at destination.

This provision was obviously placed in the order to enable the government to take advantage of the reduced freight rates on land grant railroads. In order for the government to ship at land grant rates, title to the celery had to be in the government; otherwise a fraud on the railroad would have been contemplated, which, of course, was not the case.

Henry H. Cross Co. v. United States, 133 F. 2d 183;

United States v. Jackson, 158 F. 2d 700;

Louisville and N. R. Co., v. United States, 267 U. S. 395, 69 L. Ed. 678.

V.

SUMMARY.

1. The purchase orders provide for delivery F. O. B. origin by their specific terms.

2. The purchase orders, by reason of the government bill of lading provisions, provide that title should pass to the government at the time of delivery F. O. B. cars.

3. The damage or deterioration occurred after delivery to the government, after the celery was in the possession of the government, and after title had passed to the government.

The evidence shows conclusively that delivery was made to the government in accordance with the terms of the contract and that the deterioration took place in a period seven to nine days after possession and title was in the government. No showing was made by the evidence explaining the reason for the deterioration or establishing that Appellant, the seller, was at fault in any way or that it did or failed to do anything that caused the deterioration.

4. The right to inspect and reject at a point other than the delivery point must relate to the time delivery was made to and title passed to the government.

5. The evidence showing by the government's own inspection reports that the celery was of the quality and condition called for by the contract at the time of delivery to the government, it violated the contracts of purchase by refusal to pay for the celery and judgment should have, under the admitted facts, been rendered for Appellant.

VI.
Conclusion.

It is quite apparent that not only the law but the equities are in favor of Appellant in this case. Appellee takes the position that it could reject the shipment long after it had taken possession and title arbitrarily, without inquiry as to what caused the loss and without any showing that Appellant was at fault. In all fairness Appellant should not be held responsible for the negligence of the government or its agent, the carrier, nor should it be held responsible for any casualty occurring after it had passed title and control to the government where it had not assumed such a responsibility and had contracted to deliver at a point of origin of shipment. Had Appellant contracted to deliver at Seattle the price would doubtless have been higher. The effect of the Judgment in this case is to force upon Appellant a risk it did not assume. Such a Judgment is contrary to law and is patently unfair. Appellant therefore urges that the Judgment be reversed and that Judgment be ordered for Appellant.

Respectfully submitted,

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No. 12947

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

CALIFORNIA VEGETABLE GROWERS, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF.

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Sales

No. 12947
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CALIFORNIA VEGETABLE GROWERS, a Corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

This is a suit of civil nature brought against the United States of America, and jurisdiction of the Court was invoked under the provisions of Title 28, Section 1346(a) (2), U. S. C. [Tr. p. 38.]

Statement of Facts.

The facts are not in dispute. A Stipulation of Facts appears in the Transcript of Record on page 14, and the statement as set forth in Appellant's Opening Brief is accepted with the following exceptions and additions:

a. The purchase was "F.O.B. origin, subject to inspection and acceptance at destination." [Tr. p. 14, III; Exs. G, H and I, Tr. p. 51.]

b. The temperature of the celery when inspected at destination, Seattle, Washington, were ideal temperatures for storage or transportation of celery. [Tr. pp. 26, 28, 30, 143 and 145.]

Question Presented on Appeal.

Where a buyer purchases a perishable commodity F.O.B. origin, but subject to inspection and acceptance at destination, and the commodity has deteriorated below the standards permissible without the fault of the buyer during transit, may the buyer reject the commodity in accordance with the terms of the contract?

ARGUMENT.

A. Title Did Not Pass at Point of Origin.

The inspection provisions of the contracts [Tr. pp. 31, 32 and 33] provide on the face thereof “inspection and acceptance at destination.” (Emphasis added.)

Further inspection provisions [Tr. p. 35] provide:

“1. INSPECTION—(a) Subject to the terms of Condition 4 of this contract and reserving to the Government all rights therein, it is contemplated that the supplies ordered herein shall be inspected as follows:

(1) Inspection at origin shall be made for compliance with all applicable terms of the contract, including without being limited to inspection for type, grade and condition. In such case, inspection at destination shall be limited to condition and quantity.”

Since, in accordance with the contract, a Federal-State inspection was had at origin, inspection at Seattle was limited to condition and quantity.

This language is not difficult of interpretation, and the condition referred to in limiting the inspection at destination is obviously the condition of the produce at the time of inspection at destination.

Appellant attempts to explain away the express provisions of the contracts requiring inspection for condition at destination by urging that although physical inspection is to be made at destination, it would relate to the condition of the produce at the point of origin. This line of reasoning would have the appellee specifically providing for two inspections of the condition of the produce, at two different places, for the purpose of determining what the condition was at the point of origin. This could hardly be considered a reasonable interpretation of the language of the contracts. Hence, there is no room for appellant's contention that the inspection at destination must relate to condition at the time of origin of shipment.

Such a contention may perhaps be true where title has passed at point of origin and any inspection thereafter would of necessity relate to the condition at the time the buyer took title. The instant case, however, is not such a case.

Williston, at page 101, Volume II, in his revised work on Sales, Section 280(b), states the law as follows:

“As the rule that the property passes as soon as the goods are delivered at the point where they are free on board is merely *one of presumption*, it will yield to other terms of the contract indicating a contrary intention. Especially it is not uncommon to

impose a duty on the seller to deliver goods at their ultimate destination for a price f.o.b. at point of shipment, that is, the buyer as part of the price bears all the expense on the goods after the place of shipment or other named f.o.b. point, but otherwise the contract remains one for delivery of the goods at the further point." (Emphasis added.)

See, in this connection, *Johnson v. Banta*, 87 Cal. App. 2d 907, 910 (1948), holding that f.o.b. is used in the contract in connection with the price only and not as fixing the place at which title passed.

While the appellee does not contend that this is a case arising under the Perishable Agricultural Commodities Act, the language of said Act provides an acutely analogous situation pertaining to the interpretation of contracts such as these with a "seller" of produce such as the appellant making sales in interstate commerce.

Under the heading *Trade Terms and Definitions*, the following language is set out in Title 7, Code of Federal Regulations, Section 46.30(cc), at page 226 of the First Edition:

"The term 'f.o.b. inspection and acceptance arrival' shall be deemed to mean that the commodity quoted or sold is to be placed by the seller free on board car or other agency of through transportation at shipping point, the cost of transportation to be borne by the buyer, but the seller to assume all risks of loss and damage in transit not caused by the buyer who has the right to inspect the goods upon arrival and

to reject them if upon such inspection they are found not to meet the specifications of the contract of sale at destination. The buyer may not reject without reasonable cause. Such a sale is f.o.b. only as to price and is on a delivered basis as to quality and condition.”

Attention is called to the remarkable parallel between the language of Williston on Sales quoted above and the language of the Perishable Agricultural Commodities Act here stated. Both say, in effect, that such a sale is f.o.b. only as to price, but is on a delivered basis as to quality and condition.

Obviously, then, appellant is laboring under the misapprehension that title passed at the f.o.b. point, and his citation of cases on page 7 of his Opening Brief are all in support of such a situation and, hence, not applicable to the contracts before the Court in which a contrary intention appears. The very language quoted above under the Perishable Agricultural Commodities Act, under which the appellant is a “seller” in interstate commerce, is evidence of the proper interpretation of the contractual intent of the parties.

Appellant’s quotation from Williston, Volume III, cited on page 8 of Appellant’s Opening Brief, is from Section 473 of said Volume under the heading “*Right of Inspection as a Condition Precedent to Paying the Price AFTER THE PROPERTY HAS PASSED*” (emphasis added) and is not applicable here.

The applicable section, however, Section 472 of Williston, Volume III, states, at page 5, under the heading "*Right of Inspection as a Condition Precedent to Transfer of the Property*":

"* * * He [the buyer] is entitled to examine the goods in order to decide whether he will become owner and until the examination is completed or waived he is under no obligation to accept the goods."

And, at page 7, Williston goes on under the same heading with:

"Not only opportunity to inspect *but acceptance* is a condition precedent to the transfer of ownership * * *." (Emphasis added.)

Appellant attaches importance to the provision of the purchase order requiring the commercial bill of lading to be converted to Government bill of lading at destination. While it is true that this provision was placed in the order to enable the Government to take advantage of the reduced freight rates on land-grant railroads, as it is bound by law to do (10 C. F. R., 81.10), this arrangement would naturally follow a contract requiring the Government to pay the freight rates from the point of origin. This, however, would not affect the question of the ownership of the property at the time of transportation for the purposes of risk of loss in transit, and such is the specific holding of the cases cited by the appellant in his brief at the bottom of page 12. These cases are those in which the contract provisions specifically called

for delivery f.o.b. destination. Hence, *Cross v. United States*, 133 F. 2d 183, states at page 186:

“Plaintiff, not without merit, relies strongly upon the circumstances that shipments made on Government bills of lading disclose an intention on the part of the Government to accept delivery at Robinson [point of origin]. *Such an arrangement, however, is not conclusive as to the ownership of property during transportation.*” (Emphasis added.)

The case of *Louisville and N. R. Co. v. United States*, 267 U. S. 395, is there cited by the Court in support of said proposition, and that case states, at page 398:

“But the mere use of Government forms of bills of lading is not conclusive on the question of ownership of property at the time of transportation. * * *”

It could also be reasoned that the instruction to ship on commercial bill of lading was for the specific purpose of conforming to the intention of the parties that title not pass until actual acceptance by the Government at destination who could *then* convert the commercial bills to Government bills, since the Government agreed to pay for transportation from the point of origin.

It is significant to note in the Findings of Fact [Tr. pp. 38, 39 and 40] that the Court failed to find that title passed to appellee at the time delivery was made f.o.b. cars at point of origin.

In fact, the Court spent little time on passage of title, going directly to the right of the Government to reject or accept after inspection at destination. [Tr. p. 158.]

B. Even Assuming for the Sake of Argument That Title Had Passed at Point of Origin, the Appellee Could Still Reject Acceptance of the Commodity.

The appellant states in his brief, at page 4, "Neither party could account for the deterioration and neither party had any information relating to what happened to the celery during the seven to nine day shipment period." This statement is not true. And although the Findings of the Court go only to the fact that the celery was found to be decayed beyond the tolerances permitted by "U. S. Standards for Celery" and not fit for export [Tr. p. 40], and concluded therefrom that as a matter of law "the plaintiff failed in the due performance of said contracts," the destination inspection certificates [Tr. pp. 26, 28 and 30] show "Bacterial Soft Rot" and "Watery Soft Rot," while the uncontradicted testimony of appellee's expert witness [Tr. pp. 148 and 149] and the corroborating testimony of the appellant's witness [Tr. p. 97] show said infection of the celery to have been a field disease not discernible to the naked eye. If we assume for the sake of argument that title passed at point of origin, the foregoing set of facts brings the case squarely within the case of *Conroy v. Weyl-Zukerman & Co.*, 39 Fed. Supp. 784, which holds:

"Where under the terms of a contract for sale of carload of carrots title and risk passed to buyer when carrots were shipped, buyer must bear the loss due to decay of carrots in transit, if such decay resulted from improper refrigeration, *but if decay was result of latent defect which became manifest only in the course of shipment, then loss must fall upon seller.*" (Emphasis added.)

In the *Conroy* case, *supra*, the destination inspector, after an examination of the decay, concluded that it was caused by watery soft rot. The Court states, at page 787:

“The fact that the defect in the commodity is not discernible at the point of shipment does not alter liability, which falls on the shipper by reason of an implied warranty which is attached to the goods. California Civil Code, Section 1735(1), and cases. The P. A. C. A. [Perishable Agricultural Commodities Act] does not remove the applicability of the law of sales; it merely gives an additional remedy to growers, who were previously forced to resort to expensive trials in all cases in which dealers and commission men failed to live up to the provisions of their contracts. Where goods, such as carrots in the case before this court, suffer from a latent defect which takes time to appear, and hence do not meet the implied warranty of quality which is attached to the contract, the shipper is responsible under Section 2 of the P. A. C. A.” (7 U. S. C. A., 499(b), par. 2.)

The above case cites many authorities in support of its position. To the same effect is the case of *Jos. Martinelli & Co. v. L. Gillarde Co.*, 73 Fed. Supp. 293. Vacated 168 F. 2d 276, amended 169 F. 2d 60, certiorari denied 69 S. Ct. 237, 335 U. S. 885, 93 L. Ed. 424. This case holds:

“Where cantaloups, sold as ‘U. S. No. 1’ grade melons, were inherently defective because of infection with *Cladosporium Rot*, a disease of field origin, melons did not meet the implied warranties of description and quality, and buyer, under Uniform Sales Act, was justified in rejecting them.”

The Court states, on page 295:

“Cladosporium Rot was described by appellant’s expert witness as a disease of field origin which is not apparent to the naked eye when melons are in green ripe or hard ripe stage, but which develops as the melons ripen, causing them to decay. The witness further testified that melons infected with the disease were not, in fact, U. S. No. 1 grade, even though an inspector of the United States Department of Agriculture, who did not discover its presence, so graded them. * * * no testimony adduced at the trial, contradicted this statement.”

To the same effect is the case of *California Fruit Exchange v. Henry*, 89 Fed. Supp. 580, affirmed 184 F. 2d 517, holding:

“Where food products do not meet the contract requirements shipper must bear loss resulting from deterioration in transit, and fact that defect in commodity is not discernible at point of shipment does not alter shipper’s liability arising from implied warranty.”

A further provision of the Perishable Agricultural Commodities Act under Section 46.30(j), construing trade terms and definitions, at page 222, defines “suitable shipping condition” as follows:

“‘Suitable shipping condition’ in relation to direct shipments shall be deemed to mean that the commodity, at time of billing, shall be in a condition which, when shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the destination specified in contract of sale.”

It would appear, then, that according to the cases cited, even if title were considered to have passed to the buyer at the point of origin, the celery could have been rejected at point of destination by reason of a latent defect therein, to wit, the bacterial soft rot, a field disease, which rendered the celery spoiled when delivered, so that it did not then meet the implied warranty of quality or fitness for export attached to the contract of sale.

Summary.

1. The contracts provided for a sale f.o.b. only as to price and on a delivered basis as to condition.
2. Acceptance was a condition precedent to the transfer of ownership, and the trial court found that according to the terms of the contracts the Government had the right to accept or reject.
3. The celery contained a latent defect and, hence, did not meet the implied warranties of quality.
4. The Government was justified in rejecting the shipments.

Conclusion.

The trial court properly found in favor of the appellee, who therefore respectfully urges that the judgment of the trial court be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division,

ROBERT K. GREAN,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 12953

United States
Court of Appeals

For the Ninth Circuit.

See vol. 26 95

NANCY ANN STORYBOOK DOLLS, INC., a
Corporation,

Appellant,

vs.

DOLLCRAFT COMPANY, a Corporation; LES
TER F. HINZ and ROBERT E. KERR,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

SEP 23 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 29270G

For Declaratory Relief and to Enjoin
Unfair Competition

DOLLCRAFT CO., a Corporation,
Plaintiff,

vs.

NANCY ANN STORYBOOK DOLLS, INC., a
Corporation,
Defendant.

COMPLAINT

Comes Now the Dollcraft Co., a corporation, plaintiff above-named, and for cause of action against defendant, Nancy Ann Storybook Dolls, Inc., a Corporation, alleges:

I.

That plaintiff, Dollcraft Co., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has its principal place of business at Santa Clara, State of California.

II.

That plaintiff is informed and believes and on information and belief alleges that the defendant, Nancy Ann Storybook Dolls, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a

place of business in the City and County of San Francisco, State of California.

III.

That this Court has jurisdiction because—

(a) this complaint is founded upon the trademark laws of the United States concerning the validity and the question of infringement of trademarks registered under the laws of the United States;

(b) jurisdiction is also conferred by Title 28 U.S.C., Section 2201;

(c) the value of the matter in controversy, exclusive of interest, exceeds the amount of Three Thousand Dollars (\$3,000.00).

IV.

That plaintiff, Dollcraft Co., for many years last past has been and now is engaged in the business of designing, manufacturing and selling children's dolls of various types and designs, including a group of dolls which plaintiff designates its "Fairyl-land Series" designed and decorated to depict and visually correspond with and represent various well-known characters referred to in fairy tales, Mother Goose and other nursery rimes; for example:

"Red Riding Hood"

"Little Miss Muffett"

"Little Bo-Peep"

"Mistress Mary"

"Little Miss Donnett"

"Curly Locks"

"Goldilocks"

"Sugar and Spice"

V.

That the container for each of such dolls is inscribed with the well-known name of the character which represents and depicts, and also on such container is prominently displayed the trade-mark and name of this plaintiff.

VI.

That plaintiff has built up an extensive and lucrative business in such dolls so named, and has established an enviable and valuable good will therein, which business and good will is in excess of One Hundred Thousand Dollars (\$100,000.00).

VII.

That defendant has contended and now contends that it has the exclusive right and monopoly of designating dolls depicting and representing fairy tale, Mother Goose and other nursery rime characters by the well-known names given such characters in such fairy tale, Mother Goose and other nursery rimes, and further contends that the names of such characters as given in such fairy tale, Mother Goose and other nursery rimes are the exclusive property and exclusive trade-marks of this defendant; the well-known names of such fairy tale, Mother Goose and other nursery rime characters so claimed to be the exclusive property and trade-marks of defendant, among others, are as follows:

“Red Riding Hood”

“Little Miss Muffett”

- “Little Bo-Peep”
- “Mistress Mary”
- “Little Miss Donnett”
- “Curly Locks”
- “Goldilocks”
- “Sugar and Spice”

VIII.

That defendant has contended and now does contend that it is the owner of the following United States trade-mark registrations on said well-known names of said fairy tale, Mother Goose and other nursery rime characters:

- “Red Riding Hood” Registration No. 429,007
March 26, 1946
- “Little Miss Muffett” Registration No. 432,208
August 26, 1947
- “Little Bo-Peep” Registration No. 395,454
May 26, 1942
- “Mistress Mary” Registration No. 404,576
Dec. 7, 1943
- “Little Miss Donnett” Registration No. 404,586
Dec. 7, 1943
- “Curly Locks” Registration No. 404,581
Dec. 7, 1943
- “Goldilocks” Registration No. 395,451
May 26, 1942
- “Sugar and Spice” Registration No. 403,240
Sept. 14, 1943
- “Storybook” Registration No. 389,114
July 22, 1941

and by reason thereof is entitled to the exclusive use of said names.

IX.

That plaintiff generally designates its group of dolls representing characters in fairy tale, Mother Goose and other nursery rimes as its "Fairyland Series," and defendant has contended and now does contend that the use of such designation for said group of dolls is an infringement of its alleged trade-mark "Fairyland," United States Registration No. 438,495, April 27, 1948.

X.

That plaintiff also designates one of its dolls, which is designed to depict a June bride, by the descriptive term "June Bride," and that the said defendant has contended and now does contend that the use of such name and designation of plaintiff's dolls is an infringement of its alleged trade-mark "June Girl," United States Registration No. 403,261, of September 14, 1943.

XI.

That defendant, with the calculated intent and purpose of destroying the good will and business of plaintiff in its aforesaid dolls, has heretofore, in writing, notified valuable customers of plaintiff to forthwith desist from naming, designating or advertising plaintiff's such dolls by the said well-known fairy tale, Mother Goose and nursery rime names

of the characters which such dolls depict and represent, as aforesaid, which names are as follows:

“Red Riding Hood”

“Little Miss Muffett”

“Little Bo-Peep”

“Mistress Mary”

“Little Miss Donnett”

“Curly Locks”

“Goldilocks”

“Sugar and Spice”

and has threatened said customers with litigation in the event that they refused to forthwith and immediately desist from so doing.

XII.

That defendant, well knowing that it had no exclusive right to use the said names of the said characters in fairy tales, story books, Mother Goose and other nursery rimes, and with the intent to deceive and defraud the customers of plaintiff and to defraud the plaintiff and to destroy plaintiff's said business, did threaten such customers with litigation because of the use by such customers of the names of characters in fairy tales, story books, Mother Goose and other nursery rimes in connection with dolls representing and depicting such characters.

XIII.

That plaintiff is informed and believes and on information and belief alleges that such notification and threatening, as aforesaid, by defendant of the said plaintiff's valuable customers is part of a cal-

culated plan on the part of the defendant to unlawfully destroy the plaintiff's said business in said dolls, and thereby unlawfully eliminate legal and proper competition by this plaintiff.

XIV.

That plaintiff is informed and believes and on information and belief alleges that unless restrained by this Court, defendant will continue to so improperly and unfairly compete with plaintiff by threatening customers of this plaintiff with litigation if they continue to sell the doll products of this plaintiff, all to the irreparable injury and damage of this plaintiff.

XV.

That the said acts of the defendant in so harassing plaintiff by threatening the customers of this plaintiff with litigation because of their advertising and sale of plaintiff's said doll products, as aforesaid, constitute acts of unfair competition in trade, and such acts have diminished the good will and business of this plaintiff, and plaintiff has been damaged by such acts of unfair competition by defendant in an amount which plaintiff cannot at this time accurately determine, but is informed and believes and on information and belief alleges is in an amount in excess of Ten Thousand Dollars (\$10,000.00).

XVI.

That plaintiff is informed and believes and on information and belief alleges that each and every of the said trade-mark registrations claimed to be

owned by this defendant and heretofore set out herein are invalid and were fraudulently and unlawfully obtained, in that the alleged words or phrases so registered are not trade-marks and are incapable of being exclusively appropriated.

XVII.

That plaintiff is informed and believes and on information and belief alleges that unless such trade-mark registrations as heretofore set forth are declared to be invalid by this Court, the defendant will continue to hold itself out to the trade as being entitled to the exclusive use of the words and phrases claimed to be trade-marks in such registrations, and will continue to threaten the trade with litigation should the trade use the names of characters in well-known fairy tale, Mother Goose and nursery rime names to identify dolls depicting and representing such characters, all to the injury and damage of this plaintiff.

XVIII.

That when the names of the various characters in fairy tales, story books, Mother Goose and other nursery rimes are used in connection with dolls depicting and representing such characters, such names are not used in a trade-mark sense but merely in a descriptive and primary sense.

XIX.

That the names of the various characters in fairy tales, story books, Mother Goose and other nursery rimes, when used to designate and identify such

characters, are publici juris and incapable of being exclusively appropriated by defendant as its trade-marks for dolls depicting and representing such characters.

XX.

That the names of the various characters in fairy tales, story books, Mother Goose and other nursery rimes, when applied to dolls depicting and representing such characters, are clearly descriptive and are not capable of being lawfully exclusively appropriated as trade-marks or trade names.

XXI.

That plaintiff does not use the fairy tale, Mother Goose and other nursery rime names of characters which its dolls depict and represent as trade-marks or trade names, but uses said names in their primary sense to describe such dolls.

XXII.

That plaintiff places the following inscription upon packages containing its said dolls:

Dolls with a Story
by Dollcraft
Santa Clara, California

and that defendant also contends that such inscription violates its alleged trade-mark rights in its alleged trade-mark "Storybook."

XXIII.

That plaintiff has not infringed upon any trade-mark rights of defendant.

XXIV.

That, therefore, there is an actual and substantial controversy between plaintiff, Dollcraft Co., and defendant, Nancy Ann Storybook Dolls, Inc., as to the validity of the aforesaid trade-mark registrations and the right to use the names of such fairy tale, Mother Goose, and nursery rime characters therein, and as to the infringement by plaintiff of said trade-mark registrations, and as to the validity and legality of such registrations.

XXV.

That plaintiff has no other adequate and complete remedy than by this complaint for declaratory judgment to determine the respective rights of plaintiff and defendant with respect to the use of the names of the characters of fairy tale, Mother Goose and other nursery rimes, and thereby to determine the respective rights of plaintiff and defendant so that such determination will be *res judicata* and final between the plaintiff and defendant.

Wherefore the Plaintiff Prays:

1. For a preliminary injunction pending the final determination of this suit or action, enjoining the defendant, its associates, partners, attorneys, clerks, servants, agents, employees and confederates, and all in privity with them, and each of them,

(a) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's aforesaid dolls that the sale, offering for sale or adver-

tisement of plaintiff's said dolls violates any rights of this defendant;

(b) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's aforesaid dolls that the defendant has the exclusive right to designate dolls by any of the aforesaid names;

(c) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's aforesaid dolls that they will be sued for trade-mark infringement in the event that they sell, offer for sale or advertise any of plaintiff's aforesaid dolls;

(d) from commencing in this or in any other Court against any of the customers or dealers or any prospective customer or dealer of plaintiff any suit for alleged trade-mark infringement or unfair competition because of the selling offering for sale, or advertising any of plaintiff's dolls herein set forth.

2. For a permanent injunction of the same purport and tenor as the preliminary injunction herein prayed for.

3. That the Court adjudge and declare that the plaintiff has not infringed any trade-mark rights of the defendant.

4. That the Court adjudge and declare that the plaintiff has not unfairly competed with the defendant.

5. That the Court adjudge and declare that the defendant has committed acts of unfair competition against the plaintiff.

6. That the Court declare the following trademark registrations to be invalid and of no legal force and effect:

- “Red Riding Hood” . . . Registration No. 420,007
March 26, 1946
- “Little Miss Muffett” . . Registration No. 432,208
August 26, 1947
- “Little Bo-Peep” Registration No. 395,454
May 26, 1942
- “Mistress Mary” Registration No. 404,576
Dec. 7, 1943
- “Little Miss Donnett” . Registration No. 404,586
Dec. 7, 1943
- “Curly Locks” Registration No. 404,581
Dec. 7, 1943
- “Goldilocks” Registration No. 395,451
May 26, 1942
- “Sugar and Spice” Registration No. 403,240
Sept. 14, 1943
- “Storybook” Registration No. 389,114
July 22, 1941

7. That the Court adjudge and declare that the defendant has no exclusive right to designate dolls representing the following characters in fairy tale, Mother Goose and other nursery rimes by the well-known names given them in such fairy tale, Mother Goose and other nursery rimes:

“Red Riding Hood”

“Little Miss Muffett”

“Little Bo-Peep”

“Mistress Mary”

“Little Miss Donnett”

“Curly Locks”

“Goldilocks”

“Sugar and Spice”

8. That plaintiff be awarded the sum of Twenty-five Thousand Dollars (\$25,000.00) as exemplary damages for the malicious, wanton and unfair interference with the business of plaintiff.

9. For an accounting of the actual damages sustained by this plaintiff because of the acts of unfair competition committed by this defendant.

10. That plaintiff have its costs and disbursements herein.

11. That plaintiff have such other, further or different relief as the Court may deem appropriate in the premises.

DOLLCRAFT CO.,

A Corporation,

By /s/ OSCAR A. MELLIN,

Of Mellin and Hanscom.

MELLIN AND HANSCOM,

OSCAR A. MELLIN,

LEROY HANSCOM,

JACK E. HURSH,

Attorneys for Plaintiff.

[Endorsed]: Filed November 4, 1949.

[Title of District Court and Cause.]

MOTION FOR PRELIMINARY INJUNCTION

Comes Now plaintiff above named, through its attorneys, and moves this Honorable Court for an injunction pendente lite against the defendant above named, enjoining the defendant, its associates, partners, attorneys, clerks, servants, agents, employees and confederates, and all in privity with them, and each of them,

(a) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's dolls set forth in the complaint on file herein that the sale, offering for sale or advertisement of plaintiff's said dolls violates any rights of this defendant;

(b) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's dolls set forth in the complaint on file herein that the defendant has the exclusive right to designate dolls by any of the names set forth in the complaint on file herein;

(c) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's dolls set forth in the complaint on file herein that they will be sued for trademark infringement in the event that they sell, offer for sale or advertise any of plaintiff's dolls set forth in the complaint on file herein;

(d) from commencing in this or in any other Court against any of the customers or dealers or any prospective customer or dealer of plaintiff any suit

for alleged trade-mark infringement or unfair competition because of the selling, offering for sale, or advertising any of plaintiff's dolls set forth in the complaint on file herein.

November 4, 1949.

MELLIN AND HANSCOM,

By /s/ OSCAR A. MELLIN,

Attorneys for Plaintiff.

[Endorsed]: Filed November 4, 1949.

[Title of District Court and Cause.]

TEMPORARY RESTRAINING ORDER

For Good Cause Shown and for a period until the determination of plaintiff's motion for preliminary injunction on file herein, the defendant above named, its associates, partners, attorneys, clerks, servants, agents, employees and confederates, and all in privity with them, and each of them, are enjoined—

(a) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's dolls set forth in the complaint on file herein that the sale, offering for sale or advertisement of plaintiff's said dolls violates any rights of this defendant;

(b) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's dolls set forth in the complaint on file herein that the defendant has the exclusive

right to designate dolls by any of the names set forth in the complaint on file herein;

(c) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's dolls set forth in the complaint on file herein that they will be sued for trade-mark infringement in the event that they sell, offer for sale or advertise any of plaintiff's dolls set forth in the complaint on file herein;

(d) from commencing in this or in any other Court against any of the customers or dealers or any prospective customer or dealer of plaintiff any suit for alleged trade-mark infringement or unfair competition because of the selling, offering for sale, or advertising any of plaintiff's dolls set forth in the complaint on file herein.

It Is Further Ordered that said motion for preliminary injunction on file herein be heard before this Honorable Court on the 22nd day of November, 1949.

It Is Further Ordered that the summons in this case be served upon the defendant not later than Monday, November 7, 1949.

It Is Further Ordered that a copy of said Motion for Preliminary Injunction and a copy of this restraining order be served upon the defendant simultaneously with the serving of the summons issued in this action.

November 4th, 1949.

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed November 4, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION, AND MOTION FOR AN
ORDER VACATING TEMPORARY RE-
STRAINING ORDER

To Dollcraft Co., plaintiff above named, and to
Messrs. Mellin and Hanscom, its attorneys:

You and each of you will please take notice that
on Thursday, November 10, 1949, at the hour of
10:00 o'clock a.m., or as soon thereafter as counsel
can be heard, in the courtroom ordinarily occupied
by the Honorable U. S. District Judge Michael J.
Roche, in the United States Court House and Post
Office Building, 7th and Mission Streets, San Fran-
cisco, Calif., defendant above named, by its attor-
neys, will move the above-entitled court for an
Order vacating its previous "Temporary Restraining
Order" dated November 4, 1949.

Said motion will be made upon the grounds that
the order was granted improvidently for each and
all of the following reasons:

(a) The request for said "Temporary Restraining
Order" is not supported by a verified bill of com-
plaint or by affidavit, as required by Rule 65b of the
Federal Rules of Civil Procedure.

(b) No showing of immediate and/or irrepara-
ble, and/or any injury, loss or damage, has been
made by plaintiff in support of said temporary re-
straining order, or its motion for preliminary in-
junction, on the determination of which said tem-
porary restraining order depends.

(c) The acts restrained by said temporary restraining order are included among the rights inherent in the ownership of the trade-marks and the registrations of trade-marks here involved, all of which have been regularly granted to defendant and its predecessors by the United States Patent Office. The effect of the restraining order made by this court is to restrain defendant from the normal acts and practices necessary to protect the property rights heretofore acquired by defendant, and confirmed by registration by the U. S. Patent Office and by the issuance of proper certificates of registration.

(d) Jurisdiction of this court to entertain plaintiff's complaint rests solely upon the theory that the action arises under the trade-mark laws of the United States concerning registrations heretofore granted to defendant under said laws. Diversity of citizenship such as to support a claim for unfair competition alone is not alleged or present. Assuming, but not admitting, that plaintiff is entitled to seek the declaratory judgment of this court upon the issues of validity and infringement of defendant's trade-mark registrations, said registrations are entitled to all the usual presumptions of use, ownership and validity. Unless and until this court, deciding the issues on their merits, determines that defendants trade-mark registrations are invalid or not infringed, any order of this court restraining the exercise of defendant's normal rights and duties (including the duty to notify infringers of their infringement), is outside the jurisdiction of this

court, and/or is an arbitrary and unreasonable exercise of its discretion.

(e) The serving of notice of infringement in case of an unauthorized and infringing use of a party's registered trade-mark is a proper act necessary to the effective preservation of the trade-mark rights, and to the recovery of damages resulting from infringement. The present temporary restraining order restrains such notice, in derogation of the rights inherently attaching to the registrations, and in aid of what appears to be a deliberate and willful invasion of and attack upon defendant's trade-mark rights.

(f) The temporary restraining order is unreasonable in that it restrains notice to "prospective sellers, dealers and users of plaintiff's dolls," which obviously includes everyone who may directly or indirectly buy, sell, or use one of plaintiff's dolls, all in derogation of the exclusive rights presumptively established by the registration of defendant's trade-marks by the U. S. Patent Office.

(g) No appropriate bond, as security for the costs and damages which may be incurred by defendant, has been provided.

(h) The "Temporary Restraining Order" heretofore served is defective and improper in that it does not set forth any adequate reason for its issuance.

In support of the foregoing motion, defendant will

rely upon the papers heretofore served upon it in this action, the annexed affidavit, and upon,

Rules of Civil Procedure, Rule 65a, b, c and d.

/s/ HUGH N. ORR,

/s/ CHARLES V. EVANS,

Attorneys for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT OF HUGH N. ORR IN SUPPORT
OF MOTION TO VACATE TEMPORARY
RESTRAINING ORDER

City & County of San Francisco,
State of California—ss.

Hugh N. Orr, being first duly sworn, deposes and says:

I am one of the attorneys for defendant above named, and for more than ten years last past have actively participated in the registration and enforcement of the trade-mark rights of said defendant and its predecessors.

Defendant and its predecessors have heretofore adopted, used and registered the following trade-marks applied to dressed dolls manufactured and sold by them;

“Red Riding Hood” . . . Registration No. 420,007
March 26, 1946

“Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947

- “Little Bo-Peep” Registration No. 395,454
May 26, 1942
- “Mistress Mary” Registration No. 404,576
Dec. 7, 1943
- “Little Miss Donnett” . Registration No. 404,586
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- “Curly Locks” Registration No. 404,581
Dec. 7, 1943
- “Goldilocks” Registration No. 395,451
May 26, 1942
- “Sugar and Spice” Registration No. 403,240
Sept. 14, 1943
- “Storybook” Registration No. 389,114
July 22, 1941
- “Fairyland Dolls” Registration No. 438,495
April 27, 1948

Defendant and its predecessors have expended substantial sums in the development and advertising of its and their business of manufacturing and selling dressed dolls under various trade-marks, including those above listed; and have built up a highly valuable good will in connection therewith. Defendant is the present owner of said trade-marks, registrations and good will.

It has been the policy of defendant and its predecessors to seek registration in the United States Patent Office for trade-marks adopted and used by them and which were deemed to be registerable under the trade-mark laws of the United States. It has also been the policy of defendant and its predecessors to protect and enforce their trade-mark

rights in the Patent Office and in the courts. Pursuant to said policies, defendant and its predecessors, on advice of its attorneys have served notice of infringement upon infringers of their trade-mark rights; and from time to time, have taken such other action as they were advised was necessary and proper to protect and enforce said trade-mark rights. Such notices, including those referred to in plaintiff's complaint, have been served in good faith; and upon the advise of counsel.

In Witness Whereof I have hereunto set my signature this 7th day of November, 1949.

/s/ HUGH N. ORR.

Subscribed and sworn to before me this 7th day of November, 1949.

[Seal] /s/ EUGENE P. JONES,
Notary Public.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 8, 1949.

[Title of District Court and Cause.]

VERIFICATION

State of California,
City and County of San Francisco—ss.

Lester F. Hinz, being by me first duly sworn,
deposes and says:

That he is the president of the plaintiff in the
above-entitled action; that he has read the complaint
on file herein and knows the contents thereof; and
that the same is true of his own knowledge, except
as to the matters which are therein stated upon his
information or belief, and as to those matters that he
believes it to be true.

/s/ LESTER F. HINZ.

Subscribed and sworn to before me, a notary public,
this 9th day of November, 1949.

[Seal] /s/ HELEN KITTERBOUGH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 3, 1953.

[Endorsed]: Filed November 9, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF OSCAR A. MELLIN

State of California,

City and County of San Francisco—ss.

Oscar A. Mellin, being first duly sworn, deposes and says:

That he is of legal age; that he is one of the attorneys for the plaintiff herein; that he personally filed the complaint in this action; that he personally presented to the Judge of the District Court a copy of the complaint, the Motion for Preliminary Injunction, and the Temporary Restraining Order, and the affidavit of Lester F. Hinz, and at that time made the showing of the complaint and the affidavit, upon which showing the District Court issued the Temporary Restraining Order; that from the chambers of the said District Judge affiant went immediately to the clerk's office to file said various papers, and thence gave the necessary papers to an associate for presentation to the Marshal with instructions to have the Marshal serve the said papers; that affiant had intended that the said affidavit be filed with the other papers but that through some inadvertence the same was not filed and not given to the Marshal for serving, and that fact was not discovered until Wednesday, November 9, 1949, at which time affiant returned to the office and noted from the defendant's motion that such affidavit was contended not to be filed, and upon checking in his brief-case the affiant found that the original of said affidavit had not been

filed; that the failure to file said affidavit was through inadvertence, accident and mistake.

Further affiant sayeth not.

/s/ OSCAR A. MELLIN.

Subscribed and sworn to before me, a notary public, this 9th day of November, 1949.

[Seal] /s/ HELEN KITTERBOUGH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 3, 1953.

[Endorsed]: Filed November 9, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF LESTER F. HINZ

(November 4, 1949)

State of California,
City and County of San Francisco—ss.

Lester F. Hinz, being first duly sworn, deposes and says:

That he is the president of Dollcraft Co., a corporation of California; that the said Dollcraft Co. has been, since approximately August, 1948, engaged in the business of manufacturing and selling children's dolls including a group of dolls which said Dollcraft Co. designates its "Fairylend Series," which dolls are descriptively named to correspond

[Title of District Court and Cause.]

AFFIDAVIT OF OSCAR A. MELLIN

State of California,

City and County of San Francisco—ss.

Oscar A. Mellin, being first duly sworn, deposes and says:

That he is of legal age; that he is one of the attorneys for the plaintiff herein; that he personally filed the complaint in this action; that he personally presented to the Judge of the District Court a copy of the complaint, the Motion for Preliminary Injunction, and the Temporary Restraining Order, and the affidavit of Lester L. Hinz, and at that time made the showing of the complaint and the affidavit upon which showing the District Court issued the Temporary Restraining Order; that from the chambers of the said District Judge affiant went immediately to the clerk's office to file said various papers and thence gave the necessary papers to an associate for presentation to the Marshal with instructions to have the Marshal serve the said papers; that affiant had intended that the said affidavit be filed with other papers, but through some inadvertence the said affidavit was not given to the Marshal for filing and was not discovered.

filed; that the failure to file said affidavit was through inadvertence, accident and mistake,

Further affiant sayeth not.

/s/ OSCAR A. ELLIN.

Subscribed and sworn to before me, a Notary Public, this 5th day of November, 1940.

[Seal] /s/ HELEN K. TERBOUGH,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires January 2, 1942.

[Endorsement]: Filed November 5, 1940.

[File of District Court and Clerk]

AFFIDAVIT OF LOSS OF P. 1772

(November 5, 1940)

State of California,

County of San Francisco,

I, the undersigned, Notary Public, do hereby certify that

the foregoing is a true and correct copy of the

original as the same appears in my files.

In testimony whereof, I have hereunto set my hand and

the seal of my office, at San Francisco, California,

this 5th day of November, 1940.

Helen K. Terbough

Notary Public

My commission expires January 2, 1942.

Notary Public

with the characters which they represent; for example:

“Red Riding Hood”

“Little Miss Muffett”

“Little Bo-Peep”

“Mistress Mary”

“Little Miss Donnett”

“Curly Locks”

“Goldilocks”

“Sugar and Spice”

and that Dollcraft Co. has applied such descriptive names to such dolls corresponding with the characters which said dolls represent and depict; that lately and for the first time the Nancy Ann Storybook Dolls, Inc. has charged that the use of such descriptive names and terms by Dollcraft Co. violates trade-mark rights of Nancy Ann Storybook Dolls, Inc.; that charges of unfair competition and infringement by the use of such descriptive terms and names have been made by letter to various of the customers of Dollcraft Co., including Macy's of San Francisco; that certain of the customers of Dollcraft Co., but not including Macy's of San Francisco, have contacted affiant upon receipt of such notification and threats of litigation from the attorneys of Nancy Ann Storybook Dolls, Inc., and have requested affiant to have Dollcraft Co. accept return of said goods of Dollcraft Co.; that at the present time Dollcraft Co. is in the midst of selling customers for the Christmas trade, and to have its customers so notified will, in affiant's opinion, not only destroy part

of the custom of Dollcraft Co., but might result in permanent loss of such customers, and if such loss of customers occurs at the present time, Dollcraft Co. will be considerably financially injured.

Affiant further says that he is familiar with the financial status of Dollcraft Co.; that it has a factory and plant in the County of Santa Clara, and that he is certain that said Dollcraft Co. is completely able financially to respond to any judgment of this Court as to damages and costs in the event this Court should award damages and costs to the Nancy Ann Storybook Dolls, Inc. because of alleged infringement of its trade-marks by Dollcraft Co. and its customers; that any suits brought against its customers, because of the sale of Dollcraft Co.'s products and because of the use by said customers of Dollcraft Co.'s designation of its dolls, would, in the opinion of affiant, have the effect of completely strangling and stifling Dollcraft Co.'s trade and likely irreparably and permanently destroying its business.

/s/ LESTER F. HINZ.

Subscribed and sworn to before me, a notary public, this 4th day of November, 1949.

[Seal] /s/ HELEN KITTERBOUGH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 3, 1953.

[Endorsed]: Filed November 9, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 10th day of November, in the year of our Lord one thousand nine hundred and forty-nine.

Present: the Honorable Lloyd L. Black,
District Judge.

[Title of Cause.]

MINUTE ORDER

This case came on regularly this day for hearing on the motion to vacate restraining order. After hearing Messrs. Mellin and Orr, it is Ordered that said motion be denied.

[Title of District Court and Cause.]

AFFIDAVIT OF LESTER F. HINZ

(November 15, 1949)

State of California,
County of Santa Clara—ss.

Lester F. Hinz, being first duly sworn, deposes and says:

That he is President of Dollcraft Co., a corporation of California; that said Dollcraft Co. has been engaged, since approximately May, 1948, in the business of manufacturing and selling dressed dolls;

that included in the dolls so manufactured by Dollcraft Co. is a group of dolls which said Dollcraft Co. designates its "Fairyland Series"; that an example of said group is a doll bearing the descriptive name, "Red Riding Hood"; that said "Red Riding Hood" doll is filed herewith and marked "Exhibit A"; that Nancy Ann Storybook Dolls, Inc., defendant herein, also manufactures a doll bearing the descriptive name, "Red Riding Hood"; that a sample of said Nancy Ann Storybook Dolls, Inc., is filed herewith marked "Exhibit B"; that the Dollcraft Co. doll, "Exhibit A," sells at retail from \$1.69 to \$1.95; while the Nancy Ann Storybook Dolls, Inc., doll, "Exhibit B," sell at retail for \$1.29; that Dollcraft Co. also sells dolls under the descriptive names of:

"Red Riding Hood"

"Little Miss Muffett"

"Little Bo-Peep"

"Mistress Mary"

"Little Miss Donnett"

"Curly Locks"

"Goldilocks"

"Sugar and Spice"

Affiant further states that although Dollcraft Co. has been engaged in the business of manufacturing and selling said dolls under said descriptive names for approximately one and one-half years that Nancy Ann Storybook Dolls, Inc., at no time notified said Dollcraft Co., or any of its customers,

respecting trade-mark infringement or unfair competition until October 25, 1949; that on October 23, 1949, Macy's of San Francisco, a customer of Dollcraft Co., advertised in the San Francisco Chronicle the sale of Dollcraft Co. dolls under the descriptive names: "Red Riding Hood," "Little Bo-Peep" and "Sugar and Spice"; that in said ad Macy's described the dolls as "story dolls" and "your favorite story-book dolls"; that a copy of said advertisement is attached hereto and marked "Exhibit C"; that thereafter in a letter dated October 24, 1949, Macy's was notified of unfair competition and infringement by Nancy Ann Storybook Dolls, Inc., because of the use, by Macy's, of said descriptive names in said advertisement and in the sale of said dolls, a copy of said letter of October 24, 1949, is attached hereto marked "Exhibit D"; that said letter to Macy's was the first notice received either by Dollcraft Co., or by any of said Dollcraft Co. customers of unfair competition and trade-mark infringement; that thereafter and by letter dated October 29, 1949, Dollcraft Co. received a letter charging unfair competition and infringement by Nancy Ann Storybook Dolls, Inc., because of its use of the said descriptive names in designating its dolls; a copy of said letter of October 29, 1949, is attached hereto marked "Exhibit E"; that thereafter other customers of Dollcraft Co. have been notified of unfair competition and infringement by Nancy Ann Storybook Dolls, Inc., and in many instances on receipt of said notification said customers have requested Dollcraft Co. to accept the

return of said goods sold to them by Dollcraft Co.; that Whitney's Playland At Beach on receipt of such a notice returned dolls it purchased; that West Coast 5-10-25 Cent Stores, a customer of Dollcraft Co., received a notice of infringement, dated November 2, 1949, a copy of said letter of November 2, 1949, is attached hereto marked "Exhibit F"; that said customer immediately contacted Dollcraft Co. by letter dated November 3, 1949, desiring to return said goods, a copy of said letter of November 3, 1949, is attached hereto marked "Exhibit G"; that said notification, "Exhibit G," is typical of the type of notification being received by Dollcraft Co. from its customers.

Affiant further says that typical of the sales by Dollcraft Co. of said dressed dolls are the sales for the month of October, 1949, where said Dollcraft Co. sold goods in the amount of approximately Fifteen Thousand (\$15,000.00) Dollars; that Dollcraft Co. has sold, and is now selling, dolls throughout the entire United States and at the present time is in the midst of its Christmas trade; that Dollcraft Co. employs in the manufacture and sale of its dolls, fifteen employees; that Dollcraft Co. has invested in said business of manufacturing dolls approximately Fifty Thousand (\$50,000.00) Dollars; that Dollcraft Co. is fully capable of responding to any judgment of this Court as to damages and cost in the event this Court should award damages and cost to Nancy Ann Storybook Dolls, Inc.

/s/ LESTER F. HINZ.

Subscribed and sworn to before me this 15th day of November, 1949.

[Seal] /s/ DOUGLAS M. NEILSON,
Notary Public in and for the County of Santa
Clara, State of California.

My commission expires May 14, 1953.

EXHIBIT D

(Copy)

Letterhead of the Firm of
Charles S. Evans
Attorneys and Counselors at Law
Crocker Building
San Francisco

October 24, 1949.

Macy's,
Stockton at O'Farrell,
San Francisco 8, California.

Dear Sirs:

This is in regard to your advertisement of dolls, appearing in the October 23, 1949, issues of the San Francisco Chronicle.

In behalf of our client, Nancy Ann Storybook Dolls, Inc. (with whose organization and products your purchasing and advertizing departments are undoubtedly familiar), you are hereby notified that your advertisement involves unfair competition, and infringement of our client's rights.

In particular, your reference to the products you advertized as "story" dolls and "story-book dolls,"

is believed to be obviously calculated to cause confusion, and to trade on the good will which has resulted from our client's long and nationwide use of its trade-mark "Storybook," (Reg. U. S. Pat. Office, No. 389,114, dated July 22, 1941).

In addition, you list among the products offered for sale, both in the body of the advertisement and the order blank included therein, dolls identified by the trade-marks owned by our client and registered in the U. S. Patent Office as follows:

"Red Riding Hood."

(Registration No. 420,007, dated March 26, 1946.)

"Little Bo-Peep."

(Registration No. 395,454, dated May 26, 1942.)

"Sugar and Spice."

(Registration No. 403,240, dated Sept. 14, 1943.)

Your sale of dolls bearing any of these registered trade-marks obviously involves a direct infringement of our client's rights.

It is hereby demanded that you discontinue forthwith your unfair and infringing practice above noted; and that you take appropriate steps to correct the confusion resulting from your advertisement. In that regard, our client demands that you promptly publish a statement correcting the implication that the dolls referred to in your advertisement are products of Nancy Ann Storybook Dolls, Inc. Such statements should be displayed at least

as prominently as your advertisement displays "story" and "storybook dolls," and the "Red Riding Hood," "Little Bo-Peep" and "Sugar and Spice" trade-marks. It is suggested that the statement be in substance as follows:

"The dolls featured in our advertisement appearing in the San Francisco Chronicle dated October 23, 1949, and referred to as "story dolls" and "story-book dolls" are not products made and sold by Nancy Ann Storybook Dolls, Inc., under its registered trade-mark "Storybook," or any of its registered trade-marks "Red Riding Hood," "Little Bo-Peep" and "Sugar and Spice."

A different wording for the notice may be worked out with your attorneys, if you prefer.

This matter requires your immediate attention.

Very truly yours,

THE FIRM OF CHARLES S.
EVANS,

By /s/ HUGH N. ORR.

JL

EXHIBIT E

Letterhead of the Firm of
Charles S. Evans
Attorneys and Counselors at Law
Registered Patent Attorneys
Crocker Building
San Francisco

October 29, 1949.

Registered Mail
Dollcraft Co.
Santa Clara, California.

Dear Sirs:

It has come to the attention of our client, Nancy Ann Storybook Dolls, Inc., that you have been making and selling dressed dolls in connection with which you have been using various names and trade-marks in a manner involving unfair competition and infringement of our client's trade-mark rights.

In particular, it is noted that your products have been variously referred to in advertising and on your labels as "Story" dolls, "Story-book" dolls, "Dolls with a Story," and similar designations, all calculated to cause confusion and to trade upon the good will attaching to our client's trade-marks "Storybook" (Registration No. 389,114, dated July 22, 1941) and "Story" (application for registration pending).

Also, it is noted that you are making, advertising and selling dolls in direct violation of our client's rights in the following trade-marks and registrations:

"Fairyland"	Registration 438,495 April 27, 1948
"Red Riding Hood"	Registration 420,007 March 26, 1946
"Little Miss Muffett"	Registration 432,208 Aug. 26, 1947
"Little Bo Peep"	Registration 395,454 May 26, 1942
"Mistress Mary"	Registration 404,576 Dec. 7, 1943
"Little Miss Donnett"	Registration 404,586 Dec. 7, 1943
"Curley Locks"	Registration 404,581 Dec. 7, 1943
"Goldilocks"	Registration 395,451 May 26, 1942
"Sugar and Spice"	Registration 403,240 Sept. 14, 1943
"June" ("June Girl")	Registration 403,261 Sept. 14, 1943

Demand is hereby made that you forthwith discontinue your unfair and infringing use of each and all of the marks above referred to, and all marks confusingly similar thereto; and that you account to our client for all loss and damage suffered by it, and all profits derived by you by reason of your unfair and infringing practices above noted.

Our client regards this matter as one of importance; and your immediate recognition of our client's trade-mark rights is imperative. Our client has instructed us to take whatever action may ap-

pear proper to enforce its rights, and protect its interests. We will wait a reasonable time for your reply, say ten days from the date of this notice, before taking further action.

Very truly yours,

THE FIRM OF CHARLES S.
EVANS,

By /s/ HUGH N. ORR.

EXHIBIT F

Letterhead of the Firm of
Charles S. Evans
Attorneys and Counselors at Law
Registered Patent Attorneys
Crocker Building
San Francisco

November 2, 1949.

West Coast 5c & 25c Store,
1252 Polk Street,
San Francisco, California.

Dear Sirs:

It has come to the attention of our client, Nancy Ann Storybook Dolls, Inc., that you have been selling dressed dolls in connection with which you have been using various names and trade-marks in a manner involving unfair competition and infringement of our client's trade-mark rights.

In particular, it is noted that the products you have been selling have been variously referred to in advertising and on the labels as "Story" dolls,

“Story-book” dolls, “Dolls with a Story,” and similar designations, all calculated to cause confusion and to trade upon the good will attaching to our client’s trade-marks “Storybook” (Registration No. 389,114, dated July 22, 1941, and “Story” (application for registration pending).

Also, it is noted that you are advertising and selling dolls marked in direct infringement of our client’s rights in the following trade-marks and registrations: “Fairyland,” (Reg. 438,495); “Red Riding Hood,” (Reg. 420,007); “Little Miss Muffett,” (Reg. 432,208); “Little Bo-Peep,” (Reg. 395,454); “Mistress Mary,” (Reg. 404,576); “Little Miss Donnett,” (Reg. 404,586); “Curley Locks,” (Reg. 404,581); “Goldilocks,” (Reg. 395,451); “Sugar and Spice,” (Reg. 403,240) and “June,” (Reg. “June Girl” 403,261).

Demand is hereby made that you forthwith discontinue your unfair and infringing use of each and all of the marks above referred to, and all marks confusingly similar thereto; and that you account to our client for all loss and damage suffered by it, and all profits derived by you by reason of your unfair and infringing practices above noted.

Our client regards this matter as one of importance; and your immediate recognition of our client’s trade-mark rights is imperative.

Very truly yours,

THE FIRM OF CHARLES S.
EVANS,

By /s/ HUGH N. ORR.

EXHIBIT G

Letterhead of
West Coast 5-10-25 Cent Stores
Buying and Executive Office
1252 Polk Street
San Francisco 9, California

November 3, 1949

The Dollcraft Company,
P. O. Box 267,
Santa Clara, California.

Gentlemen:

Please find enclosed a letter which we received today by registered mail which is self-explanatory.

Please advise immediately as to what we should do with this merchandise that we have on hand.

Very truly yours,

/s/ JOHN R. VERZI,

JOHN R. VERZI,

West Coast 5-10-25c Store, 1252 Polk Street, San
Francisco, Calif.

[Endorsed]: Filed November 16, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR
LEAVE TO JOIN ADDITIONAL PARTIES
PLAINTIFF, AND FOR ISSUANCE OF
SUMMONS DIRECTING THEM TO AP-
PEAR IN THE ACTION

To Dollcraft Co., plaintiff above named, and to
Messrs. Mellin and Hanscom, its attorneys:

You and each of you will please take notice that
on Monday, November 21, 1949, at the hour of 10:00
o'clock a.m., or as soon thereafter as counsel can be
heard, in the United States Court House and Post
Office Building, 7th and Mission Streets, San Fran-
cisco, California, defendant above named, by its at-
torneys, will move the above-entitled court as fol-
lows:

1. For an order joining as parties plaintiff in
this action Lester E. Hinz, of Los Gatos, California,
and Robert E. Kerr, of San Carlos, California;

2. For an order directing that Summons be
issued directing said Lester E. Hinz and Robert E.
Kerr to appear in the action; and

3. For an order extending defendants time to an-
swer or otherwise plead in this action to a date ten
days subsequent to the order of this court granting
or denying the foregoing motion.

In support of said motions, defendant will rely
upon all the papers heretofore filed in the record of
this case, upon the annexed affidavit, and upon

Federal Rules of Civil Procedure,
Rule 19.

Federal Rules of Civil Procedure,
Rule 13.

Carter Oil Co. vs. Wood,
30 F. Supp. 875.

Arizona Lead Mines Co. vs. Sullivan Mining
Co.,
3 F.D.R. 135.

General Motors Corp. vs. Provus,
100 F. 2nd 562.

Dangler vs. Imperial Mach. Co.,
11 F. 2nd 945.

National Nut Co. vs. Kelling Nut Co., et al.,
61 F. Supp. 76; 65 U.S.P.Q. 104

Wisconsin, etc. Foundation vs. Vitamin Tech.,
Inc.

41 F. Supp. 857; 51 U.S.P.Q. 345.

Denominational Env. Co. vs. Duplex Env. Co.,
80 F. 2nd 186, (Sec. 1.194)

Dated: San Francisco, Calif., November 16, 1949.

NANCY ANN STORYBOOK
DOLLS, INC.,

By /s/ HUGH N. ORR,

By /s/ CHARLES S. EVANS.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 18, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF A. L. ROWLAND IN SUPPORT OF DEFENDANT'S MOTION FOR LEAVE TO JOIN ADDITIONAL PARTIES PLAINTIFF, AND FOR ISSUANCE OF SUMMONS DIRECTING THEM TO APPEAR IN THE ACTION

State of California,
City & County of San Francisco—ss.

A. L. Rowland, being first duly sworn, deposes and says:

I am Secretary-Treasurer of Nancy Ann Storybook Dolls, Inc., and have actively participated in the management of said company and its predecessors since the initial founding of the organization more than twelve years ago. I am familiar with substantially all of the activities of defendant company and its predecessors.

Defendant Nancy Ann Storybook Dolls, Inc., is the present owner of the following trade-marks and U. S. Patent Office registrations thereof:

- “Red Riding Hood” . . . Registration No. 420,007
March 26, 1946
- “Little Miss Muffett” . . Registration No. 432,208
August 26, 1947
- “Little Bo-Peep” Registration No. 395,454
May 26, 1942
- “Mistress Mary” Registration No. 404,576
Dec. 7, 1943

“Little Miss Donnett”	Registration No. 404,586
	Dec. 7, 1943
“Curly Locks”	Registration No. 404,581
	Dec. 7, 1943
“Goldilocks”	Registration No. 395,451
	May 26, 1942
“Sugar and Spice”	Registration No. 403,240
	Sept. 14, 1943
“Storybook”	Registration No. 389,114
	July 22, 1941
“Fairyland Dolls”	Registration No. 438,495
	April 27, 1948

All of said marks have been used by defendant and its predecessors as trade-marks for dressed dolls continuously for many years. It has been the policy of defendant and its predecessors to protect its and their trade-mark rights against infringing and/or unfair use by others, including the formal serving of notice and the filing of suit when deemed necessary. All notices of infringement have been served by counsel or with the approval of counsel.

Affiant is informed and believes, that Lester E. Hinz is president of plaintiff Dollcraft Co. Said Lester E. Hinz, then operating as Myers Ceramic Co., made and supplied to defendant's predecessors bisque doll bodies used by them for making their dressed doll products during the period January, 1943, to July, 1945. Affiant is informed and believes that neither said Lester E. Hinz nor his company, Myers Ceramic Company, had previously manufactured doll bodies; and that the manufacture of said

doll bodies was undertaken by said Hinz and his company primarily and substantially exclusively for defendant's predecessors during the period indicated.

Robert E. Kerr was employed by defendant's predecessors during the period January, 1941, to June 28, 1944. As an employee of defendant's predecessors, said Kerr had opportunity to and, as affiant is informed and believes, did acquire confidential information with regard to the methods of manufacture, used by defendant's predecessors, the source of various materials used by said predecessors in the manufacture of its doll products, and other matters of importance in relation to the conduct of the business.

Affiant is informed and believes that the individuals, Lester E. Hinz and Robert E. Kerr, and perhaps others now unknown to affiant, have conspired to utilize information and knowledge acquired by them by reason of their previous connections with defendant company, to organize and operate a business of manufacturing and selling dressed dolls of the general kind made and sold by defendant's predecessors; and, as affiant now believes the organizing and the operation of said business was under the direct personal supervision and control of said Lester E. Hinz and Robert E. Kerr, and was primarily for their individual benefits; and in so organizing and operating said business, said individuals made unfair use of the facilities and knowledge gained from said confidential relationships with defendant's predecessors, to the substantial and con-

tinuing damage and injury of defendant and its predecessors.

Affiant is further informed and believes that plaintiff Dollcraft Co. is controlled and dominated by said Lester E. Hinz and Robert E. Kerr and that said corporation constitutes merely a mask for the personal activities, interests and liabilities of the said individual officers and stockholders.

Affiant further is informed and believes that in the conduct of said business said Lester E. Hinz and Robert E. Kerr, individually and as officers and stockholders of plaintiff company have deliberately copied defendant's doll products, including non-essential details thereof; and deliberately and for the purpose of trading upon the good will of defendant and its predecessors, has applied to said products marks identical with or confusingly similar to each of the trade-marks and registrations above listed in wilful infringement of defendant's trademark rights.

In Witness Whereof I have hereunto set my signature this 17th day of November, 1949.

/s/ A. L. ROWLAND.

Subscribed and sworn to before me this 17th day of November, 1949.

[Seal] /s/ EUGENE P. JONES,
Notary Public.

Receipt of copy acknowledged.

[Endorsed]: Filed November 18, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF LESTER F. HINZ

(November 18, 1949)

State of California,

City and County of San Francisco—ss.

Lester F. Hinz, being first duly sworn, deposes and says:

That Dollcraft Co. was formed as a copartnership on or about September 28, 1946, the copartners being Elise Juster, Maurice Juster and Richard Molli-son, and the business of Dollcraft Co. at that time was the designing, dressing and the sale of dressed toy dolls, and it has been continuously in business since that time in such business; that some time subsequent to September 28, 1946, Dollcraft Co. became a customer of Kerr & Hinz Doll Company, purchasing from said Kerr & Hinz Doll Company undressed dolls in considerable quantity; that some time just prior to April 20, 1948, the said Dollcraft Co. became considerably indebted to said Kerr & Hinz Doll Company for the purchase of such dolls and had insufficient capital to liquidate such debts; that in order to avoid bankruptcy of Dollcraft Co. and to safeguard the account receivable, said Robert E. Kerr and Lester F. Hinz, as individuals, agreed with the said copartners of Dollcraft Co. to transfer the assets and good will of Dollcraft Co. into a corporation, the said Robert E. Kerr and the said Lester F. Hinz taking stock in liquidation of the debt to the partnership of Kerr & Hinz Doll Com-

pany and for the advance of additional capital to make Dollcraft Co. solvent and enable it to operate on a business basis; the stock in the corporation which was formed on April 20, 1948, was issued fifteen (15) shares to Lester F. Hinz, fifteen (15) shares to Robert E. Kerr, five (5) shares to Maurice Juster, five (5) shares to Elise Juster, and five (5) shares to Richard Mollison; that ever since that time the business of Dollcraft Co. has been under the complete management of Maurice and Elise Juster, who spend all of their time in the active management of the business; that all of the Dollcraft Co.'s products, which are dressed dolls, are designed by the said Elise Juster, and said Elise Juster and Maurice Juster have determined and now do determine all of the designs to be produced by Dollcraft Co., and do all of the purchasing of materials and other things necessary to conduct said business; that the said Robert E. Kerr and the said Lester F. Hinz take no active part in the management of said business except in an advisory capacity to said Maurice Juster; that the selling of the dolls is under the direction and control of Maurice Juster, and that the salesmen for the dolls are hired by Dollcraft Co. and paid by Dollcraft Co.; that the said Robert E. Kerr, as far as the doll business is concerned, spends his entire time in the production and sale of undressed toy dolls of various types and kinds; that said Lester F. Hinz acts only in an advisory capacity in the business of Kerr & Hinz Doll Company and Dollcraft Co.; that said

Lester F. Hinz devotes his entire time to the business of Myers Ceramic Products Co.

That affiant is the owner of the Myers Ceramic Products Co., of Santa Clara, California, and has been the owner and operator of said business since some time in 1936, and that business, continuously from that date, has been the business of manufacturing tile; art objects, bathroom accessories, statuary and the like; that the process and methods of making bisque toy dolls is exactly the same as that of making statuary, art objects and bathroom accessories, requiring only differently shaped molds; that some time during 1941 he was offered the business of making bisque dolls in his said plant for Nancy Ann Storybook Dolls, Inc.; that he provided the molds and accepted orders from Nancy Ann Storybook Dolls, Inc., for dolls, and up until approximately the middle of 1945 produced bisque dolls for Nancy Ann Storybook Dolls, Inc., upon the order of Nancy Ann Storybook Dolls, Inc., and that approximately at that time he was advised by A. L. Rowland that Nancy Ann Storybook Dolls, Inc., had procured a ceramic plant of a nature similar to the plant of the Myers Ceramic Products Co., at Stockton, California, and indicated to affiant that they would no longer purchase the bisque dolls from affiant, and that shortly thereafter orders for dolls from Nancy Ann Storybook Dolls, Inc., to the Myers Ceramic Products Co. completely ceased; that at that time the Myers Ceramic Products Co. had a considerable investment in molds and equipment for making toy dolls and immediately sought other cus-

tomers for its undressed dolls; immediately thereafter affiant developed said business of manufacturing undressed dolls and has sold them nationwide ever since, one of its customers being Dollcraft Co., a copartnership, as previously set out herein; that the business of selling undressed dolls to various customers throughout the nation grew rapidly and to assist him in the business, the said Lester F. Hinz formed a partnership with Robert E. Kerr, the business of which was to promote the sale of undressed dolls manufactured by the Myers Ceramic Products Co.; that said copartnership was known as Kerr & Hinz Doll Company, and the capital for the company was supplied jointly by the said Lester F. Hinz and the said Robert E. Kerr; that the business of that concern was to purchase the bisque dolls from the Myers Ceramic Products Co., decorate them but not dress them, and sell them to various customers throughout the entire United States, including Dollcraft Co., and at the present time said firm of Kerr & Hinz Doll Company have over one hundred (100) customers in various parts of the United States for said dolls; that the said Kerr & Hinz Doll Company has been in said business continuously since the middle of 1945 and now are in that same business, in which business the said Robert E. Kerr devotes all of his time; that affiant and the said Robert E. Kerr do not take any active part in the management of Dollcraft Co. or in the design or procurement of materials for the dolls produced by Dollcraft Co. other than the bisque dolls themselves but merely act in an advisory capacity

to Maurice and Elise Juster; that no suggestions or other information were ever given to affiant by anyone associated with Nancy Ann Storybook Dolls, Inc., in affiant's manufacture of bisque dolls other than the ordinary information as to the sizes and selection ordinarily made by customers, and that no trade secret, confidential or other information in this connection was ever turned over to affiant by Nancy Ann Storybook Dolls, Inc.

/s/ LESTER F. HINZ.

Subscribed and sworn to before me this 18th day of November, 1949.

[Seal] /s/ HELEN KITTERBAUGH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 3, 1953.

[Endorsed]: Filed November 21, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF ELISE JUSTER

State of California,
County of Santa Clara—ss.

Elise Juster, being first duly sworn, deposes and says:

That affiant has been in the business of dressing dolls since September, 1946; that at all times the dress of all dolls made and sold by Dollcraft Co.

were and are the original creations of affiant and express affiant's own picturization of the characters represented, retaining, however, the well known basic characteristics clearly identifying the characters which said dolls depict and represent; that affiant has never received any information of any type or character from Lester F. Hinz or Robert E. Kerr respecting the design of doll dresses, types of material to be used in said dresses, the source of material for said dresses or the methods of producing said dresses; that affiant was in the business of creating dress designs and dressing and selling dolls for approximately a year prior to her personally knowing either Robert E. Kerr or Lester F. Hinz.

/s/ ELISE JUSTER.

Subscribed and sworn to before me this 18th day of November, 1949.

[Seal] /s/ DOUGLAS M. NEILSON,
Notary Public in and for the County of Santa Clara,
State of California.

My commission expires May 14, 1953.

[Endorsed]: Filed November 21, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT E. KERR

State of California,
County of Santa Clara—ss.

Robert E. Kerr, being first duly sworn, deposes and says:

That he was employed by Nancy Ann Storybook Dolls, Inc., between the period of 1941 and 1945, commencing as stock boy clerk and later in charge of shipping; that he had nothing to do with the designing of the dolls or the purchasing of any materials therefor; that he was not in any confidential capacity, was never consulted in connection with policies or other matters of a confidential nature in said concern; that he invested a small amount of capital in the firm of Kerr & Hinz Doll Company in approximately 1945, and ever since that time has been continuously active and has devoted all of his time to the business of that company in the selling of undressed dolls; that he has not and does not now take any active part either in the design or production of dressed dolls by Dollcraft Co. or in the management thereof, other than his normal duties in Kerr & Hinz Doll Company in maintaining the Dollcraft Co. supplied with undressed dolls; that he received and obtained no confidential or other information while an employee of Nancy Ann Storybook Dolls, Inc., and therefore could not have used or employed any such information or divulged any such information to either the firm of Kerr & Hinz Doll

Company, Myers Ceramic Products Co., or Dollcraft Co.

/s/ ROBERT E. KERR.

Subscribed and sworn to before me this 18th day of November, 1949.

[Seal] /s/ DOUGLAS M. NEILSON,
Notary Public in and for the County of Santa Clara,
State of California.

My commission expires May 14, 1953.

[Endorsed]: Filed November 21, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 22nd day of November, in the year of our Lord one thousand nine hundred and forty-nine.

Present: the Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTE ORDER

This case came on regularly this day for hearing on motion for a preliminary injunction and motion to join additional parties plaintiff. After hearing Mr. Hursh and Mr. Orr, it is Ordered that the mo-

tion for a preliminary injunction be denied without prejudice. Further Ordered that ruling be reserved on the motion to join parties plaintiff. Further Ordered that defendant have ten days within which to answer the complaint herein.

[Title of District Court and Cause.]

DEFENDANT'S ANSWER AND COUNTERCLAIM

Answering the complaint heretofore filed in the above-entitled action, defendant admits, denies and alleges, as follows:

1. Defendant admits that plaintiff Dollcraft Co. is a corporation of the State of California; and that it has a place of business at Santa Clara, County of Santa Clara, State of California.

2. Defendant admits that it is a corporation duly organized and existing under and by virtue of the laws of the State of California; and that it has a place of business in the City and County of San Francisco, State of California.

3. Defendant admits the jurisdiction of this court because the action involves the validity and infringement of trade-marks registered under the trade-mark laws of the United States; and admits that jurisdiction is also conferred by Title 28, U.S.C. Sec. 2201, and that the matter in controversy, exclusive of interest, exceeds the amount of Three Thousand Dollars (\$3,000.00).

tion for a preliminary injunction be denied without prejudice. Further Ordered that ruling be reserved on the motion to join parties plaintiff. Further Ordered that defendant have ten days within which to answer the complaint herein.

[Title of District Court and Cause.]

DEFENDANT'S ANSWER AND COUNTERCLAIM

Answering the complaint heretofore filed in the above-entitled action, defendant admits, denies and alleges, as follows:

1. Defendant admits that plaintiff Dollcraft Co. is a corporation of the State of California; and that it has a place of business at Santa Clara, County of Santa Clara, State of California.
2. Defendant admits that it is a corporation duly organized and existing under and by virtue of the laws of the State of California; and that it has a place of business in the City and County of San Francisco, State of California.
3. Defendant admits the jurisdiction of this court because the action involves the validity and infringement of trade-marks registered under the trade-mark laws of the United States; and admits that jurisdiction is also conferred by Title 28, U.S.C. Sec. 2201, and that the matter in controversy, exclusive of interest, exceeds the amount of Three Thousand Dollars (\$3,000.00).

4. Defendant admits that plaintiff Dollcraft Co. has heretofore manufactured and sold children's dolls, which said plaintiff has designated its "Fairyl-land Series," and which it has further designated by the marks "Red Riding Hood," "Little Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Little Miss Donnett," "Curly Locks," "Goldilocks" and "Sugar and Spice"; but as to all other allegations of numbered paragraph IV, defendant is without knowledge, information or belief and therefore denies each and all of said other allegations.

5. Defendant admits that plaintiff Dollcraft Co. has sold dolls packaged in containers bearing the names recited in paragraph 4 hereof, but denies that said plaintiff has any right to so mark said dolls and/or the containers therefor; and in all other respects denies each and all of the allegations of numbered paragraph V of plaintiff's complaint.

6. Defendant is without knowledge, information or belief with respect to the allegations of paragraph VI of plaintiff's complaint, and therefore denies each and all of said allegations.

7. Defendant admits that it has contended and now contends that it has the exclusive right to apply to dressed dolls various trade-marks owned by it including the following trade-marks heretofore adopted and used by it and its predecessors and registered in the United States Patent Office:

"Red Riding Hood"...Registration No. 420,007
March 26, 1946

- “Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947
- “Little Bo-Peep” Registration No. 395,454
May 26, 1942
- “Mistress Mary” Registration No. 404,576
Dec. 7, 1943
- “Little Miss Donnett” . Registration No. 404,586
Dec. 7, 1943
- “Curly Locks” Registration No. 404,581
Dec. 7, 1943
- “Goldilocks” Registration No. 395,451
May 26, 1942
- “Sugar and Spice” Registration No. 403,240
Sept. 14, 1943
- “Storybook” Registration No. 389,114
July 22, 1941
- “Fairyland Dolls” Registration No. 438,495
April 27, 1948

but in all other respects defendant denies the allegations of paragraph VII of plaintiff's complaint; and further denies that it has contended or now contends that it has the exclusive right and monopoly of designating dolls by names of characters in fairy tale, Mother Goose and other nursery rhymes, other than as defendant has acquired such exclusive right by adoption, use and registration as trade-marks of certain names of that general classification, including those hereabove listed.

8. Defendant admits the allegations of paragraph VIII of plaintiff's complaint.

9. Defendant admits the allegations of paragraph IX of plaintiff's complaint.

10. Defendant admits the allegations of paragraph X of plaintiff's complaint.

11. Defendant admits that it has heretofore notified, in writing, various retail dealers that their sale of dressed dolls bearing defendant's registered trade-marks, including those listed in paragraph XI of plaintiff's complaint, involves infringement and unfair competition, and has demanded that such unfair and infringing practices be discontinued; but defendant denies that said notices were served with intent or purpose of destroying any good will and/or business of plaintiff to which plaintiff was or is lawfully entitled, and alleges that all such notices were served in good faith solely for the proper protection of the trade-marks, business and good will of defendant.

12. Defendant denies each and every allegation of paragraph XII of plaintiff's complaint.

13. Defendant denies each and every allegation of paragraph XIII of plaintiff's complaint.

14. Defendant denies each and every allegation of paragraph XIV of plaintiff's complaint; except that it admits and alleges that it will continue to serve notice of infringement and unfair competition upon dealers who sell or offer to sell dressed dolls not originating with defendant and which bear a trade-mark identical or confusingly similar to any trade-mark owned by defendant.

15. Defendant denies each and all of the allegations of paragraph XV of plaintiff's complaint.

16. Defendant denies each and all of the allegations of paragraph XVI of plaintiff's complaint; and alleges that each and every trade-mark referred to has been properly and exclusively appropriated and used by defendant and its predecessors, and has been validly registered in the United States Patent Office, and is now owned by defendant.

17. Defendant admits that unless its trade-mark registrations herein involved are declared to be invalid, it will continue to claim the exclusive right to use the same in connection with the sale of its doll products, and to take such action as may be advised to restrain unfair and infringing use of said registered trade-marks by others; but denies that it has heretofore threatened or will hereafter threaten the trade in any way because of the use of fairy tale, Mother Goose and/or nursery rhyme names for dolls other than those heretofore or hereafter appropriated and owned by defendant and its predecessors; and denies that plaintiff has been or will be unjustly damaged by reason of defendant's conduct.

18. Defendant denies each and all of the allegations of paragraph XVIII of plaintiff's complaint; and asserts that the names for which defendant has secured the registrations herein involved have in fact been used as trade-marks, and are validly registered as such.

19. Defendant denies that the names appropriated and used by it and its predecessors for identifying doll products of its and their manufacture are *publici juris*, and/or that they are incapable of being exclusively appropriated as trade-marks by defendant and its predecessors; and defendant alleges that said names have in fact been used as trade-marks and are recognized as such by the public in general.

20. Defendant denies each and all of the allegations of paragraph XX of plaintiff's complaint; and alleges that at least as to names of the general description referred to, which defendant and its predecessors have adopted and used for dressed dolls, the names have been used in a trade-mark sense, and have acquired a trade-mark significance recognized by the purchasing public.

21. Defendant denies each and all of the allegations of paragraph XXI of plaintiff's complaint; and alleges that plaintiff's use of fairy tale, Mother Goose and other nursery rhyme names registered as trade-marks by defendant is calculated to cause confusion and to enable plaintiff to benefit unjustly from the good will which defendant has established.

22. Defendant admits the allegations of paragraph XXII of plaintiff's complaint.

23. Defendant denies the allegations of paragraph XXIII of plaintiff's complaint.

24. Defendant admits the allegations of paragraph XXIV of plaintiff's complaint, except that

it denies that there is any controversy or question with respect to defendant's right to adopt and use the names of fairy tale, Mother Goose and nursery rhyme names, as trade-marks or otherwise.

25. Defendant admits that the right of defendant to adopt, use and register the trade-marks herein involved, and the alleged right of plaintiff to use the same or confusingly similar marks on goods of the same descriptive properties should be determined by this court.

Wherefore defendant prays:

1. That plaintiff's action be dismissed.
2. That defendant recover from plaintiff its costs of suit herein, including attorney's fees.
3. That defendant have such other and further relief as may be found proper.

Counter-Claim

By way of counter-claim and/or cross-complaint, defendant Nancy Ann Storybook Dolls, Inc., alleges:

I. That defendant-counter-claimant is a corporation duly organized and existing under the laws of the State of California and is successor to Nancy Ann Dressed Dolls, (a partnership), and Nancy Ann Dressed Dolls, Inc., (a corporation of the State of California); and has a place of business at San Francisco, California.

II. That plaintiff-counter defendant, Dollcraft

Co., is a corporation of the State of California and, as defendant is informed and believes, is successor to a partnership previously operating under substantially the same name.

III. That, as defendant is informed and believes, Lester E. Hinz is a resident of Los Gatos, County of Santa Clara, State of California; and is president of plaintiff Dollcraft Co.; and has actively participated in the organization of said company, and in the direction of its policies and affairs, from a date prior to its incorporation. It is further alleged, on information and belief, that said Lester E. Hinz owns all or a substantial interest in Myers Ceramic Products Co., and Kerr & Hinz Doll Co., both of which organizations have a place of business at Santa Clara, County of Santa Clara, State of California, and both of which organizations have heretofore been and now are engaged in the business of manufacturing and/or processing dolls ultimately distributed to and through retail dealers as the product of Dollcraft Co.

IV. That Robert E. Kerr is a resident of San Carlos, County of San Mateo, State of California; and is vice-president of plaintiff Dollcraft Co., and has actively participated in the organization of said company and in the direction of its policies and affairs from a date prior to its incorporation. It is further alleged that said Robert E. Kerr owns a substantial interest in Kerr & Hinz Doll Co., which organization has heretofore and now is engaged in the business of manufacturing and/or processing

dolls ultimately distributed to and through retail dealers as the product of plaintiff Dollcraft Co.

V. That this is a claim for infringement of trade-mark rights owned by defendant-counter-claimant, arising under the trade-mark laws of the United States; and also involving questions of unfair competition arising out of acts of the plaintiff-counter-defendants above named in connection with their practices in infringement of defendant's trade-mark rights, with respect to which the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

VI. That defendant and its predecessors for many years have been and now are engaged in the business of manufacturing and selling dressed dolls sold through department stores and other retail establishments throughout the United States and in foreign commerce.

VII. That the dolls so manufactured and sold have been marked with various trade-marks heretofore adopted and exclusively used by defendant and its predecessors to identify said dolls as the product of defendant and its predecessors, including the following trade-marks heretofore registered in the United States Patent Office:

“Red Riding Hood” . . . Registration No. 420,007
March 26, 1946

“Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947

"Little Bo-Peep"	Registration No. 395,454 May 26, 1942
"Mistress Mary"	Registration No. 404,576 Dec. 7, 1943
"Little Miss Donnett"	Registration No. 404,586 Dec. 7, 1943
"Curly Locks"	Registration No. 404,581 Dec. 7, 1943
"Goldilocks"	Registration No. 395,451 May 26, 1942
"Sugar and Spice"	Registration No. 403,240 Sept. 14, 1943
"Storybook"	Registration No. 389,114 July 22, 1941
"Fairyland Dolls"	Registration No. 438,495 April 27, 1948
"June Girl"	Registration No. 403,261 Sept. 14, 1943

VIII. That said trade-marks and each of them were appropriated by defendant-counter-claimant and its predecessors, and have been used by them continuously from a date long prior to the commission of the acts of plaintiff-counter-defendants herein complained of; and that said trade-marks and each of them have been assigned to and are now owned by defendant-counter-claimant, together with all rights and claims pertinent thereto.

IX. That the dolls manufactured and sold by defendant-counter-claimant and its predecessors, have been of excellent quality and workmanship, and are widely known and recognized as products

dolls ultimately distributed to and through retail dealers as the product of plaintiff Dollcraft Co.

V. That this is a claim for infringement of trade-mark rights owned by defendant-counter-claimant, arising under the trade-mark laws of the United States; and also involving questions of unfair competition arising out of acts of the plaintiff-counter-defendants above named in connection with their practices in infringement of defendant's trade-mark rights, with respect to which the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

VI. That defendant and its predecessors for many years have been and now are engaged in the business of manufacturing and selling dressed dolls sold through department stores and other retail establishments throughout the United States and in foreign commerce.

VII. That the dolls so manufactured and sold have been marked with various trade-marks heretofore adopted and exclusively used by defendant and its predecessors to identify said dolls as the product of defendant and its predecessors, including the following trade-marks heretofore registered in the United States Patent Office:

“Red Riding Hood” . . . Registration No. 420,007
March 26, 1946

“Little Miss Muffett” . . . Registration No. 432,208
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"Storybook"	Registration No. 389,114 July 22, 1941
"Fairyland Dolls"	Registration No. 438,495 April 27, 1948
"June Girl"	Registration No. 403,261 Sept. 14, 1943

VIII. That said trade-marks and each of them were appropriated by defendant-counter-claimant and its predecessors, and have been used by them continuously from a date long prior to the commission of the acts of plaintiff-counter-defendants herein complained of; and that said trade-marks and each of them have been assigned to and are now owned by defendant-counter-claimant, together with all rights and claims pertinent thereto.

IX. That the dolls manufactured and sold by defendant-counter-claimant and its predecessors, have been of excellent quality and workmanship, and are widely known and recognized as products

which conform to a high standard of quality; that said trade-marks and each of them have become widely known and identified as indicating products made and sold by defendant-counter-claimant and its predecessors; that defendant and its predecessors have been and now are widely and favorably known, and its various doll products have acquired great popularity and are widely known and sought as toys and by collectors of dolls.

X. That said products so made and sold are commonly known and referred to by the public by the trade-marks variously applied thereto by defendant-counter-claimant and its predecessors; and that by reason of long and extensive use of said trade-marks and the excellent reputation which defendant-counter-claimant and its predecessors and their products have enjoyed, a highly valuable good will has been built up in connection with said trade-marks and each of them, said value being greatly in excess of the jurisdictional amount of Three Thousand Dollars (\$3,000.00).

XI. That for a period of many months last past, the start of which period is unknown to defendant-counter-claimant, but which period is believed to have begun long subsequent to the adoption and use of each of the trade-marks here involved by defendant-counter-claimant and its predecessors, plaintiff-counter-defendants have applied to dolls of their manufacture marks identical with or confusingly similar to the registered trade-marks of defendant-counter-claimant as set forth, including:

"Red Riding Hood"	Registration No. 420,007
	March 26, 1946
"Little Miss Muffett"	Registration No. 432,208
	August 26, 1947
"Little Bo-Peep"	Registration No. 395,454
	May 26, 1942
"Mistress Mary"	Registration No. 404,576
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"Curley Locks"	Registration No. 404,581
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"Goldilocks"	Registration No. 395,451
	May 26, 1942
"Sugar and Spice"	Registration No. 403,240
	Sept. 14, 1943
"Storybook"	Registration No. 389,114
	July 22, 1941
"Fairyland Dolls"	Registration No. 438,495
	April 27, 1948
"June Girl"	Registration No. 403,261
	Sept. 14, 1943

XII. That said marks, so applied by plaintiff-counter-defendants were knowingly and wilfully adopted and used by said plaintiff-counter-defendants with the intent to deceive and confuse the public, and the trade in general, for the purpose and with the effect of trading upon the reputation and good will of the business and products of defendant-counter-claimant and its predecessors, and of causing purchasers to buy the doll products

of plaintiff-counter-defendants bearing one or more of defendant-counter-claimant's trade-marks above listed, believing them to be the trade-marked product of defendant-counter-claimant and its predecessors sold under the trade-marks respectively simulated by plaintiff-counter-defendants' marks; and that such use of the said trade-marks by plaintiff-counter-defendants constitutes infringement of defendant-counter-complainant's rights in and to the trade-marks listed in paragraph XI of this counter-claim.

XIII. That plaintiff - counter - defendants have widely advertised dolls each bearing one or more of the marks hereinabove listed, and has included in the packages containing said dolls lists of other doll products bearing one or more other marks of said list.

XIV. That such use and advertising by plaintiff-counter-defendants of defendant-counter-claimant's trade-marks as hereinabove alleged involves unfair competition in that it is calculated to confuse and deceive, and in fact has confused and deceived the public into believing that its and their goods are those of defendant-counter-complainant; and, as defendant-counter-complainant is informed and believes, has enabled plaintiff-counter-defendants to trade upon and unjustly profit from the reputation and good will of defendant-counter-claimant and its predecessors and their products, and to palm off their products upon purchasers (including the general public) who are mislead to believe they are purchasing dolls made by defendant-counter-claimant and its predecessors, particularly with respect

to dolls desired by collectors for addition to collections of the dolls of the various series heretofore produced and widely publicized by defendant-counter-claimant and its predecessors under the trade-marks above set forth.

XV. That plaintiff-counter-defendants have had due notice of the trade-mark rights of defendant-counter-complainant and of plaintiff-counter-defendants' infringement and unfair competition as hereinabove alleged; and each and all have refused to discontinue said acts of infringement and unfair competition, and unless restrained by this court will continue the acts complained of.

XVI. That said Lester E. Hinz, then operating as Myers Ceramic Co., made and supplied to defendant's predecessors bisque doll bodies for use in making dressed dolls during the period January, 1943, to July, 1945; and, as defendant is informed and believes, neither said Hinz or said Myers Ceramic Co. had previously manufactured doll bodies; and that said manufacture of said doll bodies was undertaken by said Hinz and his said company primarily and substantially exclusively for defendant's predecessors during said period. Doll bodies manufactured by said Hinz and his said Myers Ceramic Co. for Kerr & Hinz Doll Co. and plaintiff Dollcraft Co. are, as defendant is informed and believes, substantially the same as those initially made for and supplied to defendant's predecessors, and are made by methods and in accordance with practices developed by or for defendant's predecessors.

Robert E. Kerr, and each of them, their respective associates, agents, servants, employees, heirs, successors and all others in privity with them or any of them, be enjoined during the pendency of this action and permanently thereafter:

(a) from using any of the trade-marks of defendant-counter-claimant herein involved, or any mark confusingly similar thereto, alone or in conjunction with any other mark, symbol or design, upon or in connection with the sale of any doll or other product of the same descriptive properties as the doll products to which defendant - counter - complainant's trade-marks have been applied;

(b) from infringing in any way defendant's trade-mark rights in any of its trade-marks herein involved; and

(c) from doing, inducing, aiding or directing others to do any act involving or which may cause unfair competition between the products of the parties.

2. That plaintiff-cross-defendants be required to account for and pay over to defendant-counter-claimant all of the gains, profits and advantages derived by said plaintiff-cross-defendants, and each of them, by reason of the infringements and acts of unfair competition alleged in this counter-claim, together with all damages to defendant-counter-claimant resulting therefrom, the amount thereof to be trebled because of the deliberate and wilfull nature of the infringing and unfair acts.

3. That defendant-counter-claimant recover from plaintiff-counter-defendants its costs and disbursements of suit, including attorney's fees.

4. That defendant-counter-claimant have such other and further relief as is just and proper in the premises.

NANCY ANN STORYBOOK
DOLLS, INC.
(A Corporation.)

By /s/ HUGH N. ORR,
/s/ CHARLES S. EVANS,
Its Attorneys.

Duly verified.

[Endorsed]: Filed December 5, 1949.

[Title of District Court and Cause.]

ORDER FOR ISSUANCE OF SUMMONS

Defendant having presented its verified answer and counter-claim in the above-entitled action alleging claims as to which plaintiff corporation and certain officers of plaintiff corporation are charged to be jointly and/or severally liable; and good cause therefore appearing, it is hereby

Ordered:

That summons be issued directed to the following named individuals:

Lester E. Hinz, of Los Gatos, Santa Clara County, Calif.,

Robert E. Kerr, of San Carlos, San Mateo County, Calif., officers of plaintiff corporation, requiring that they appear as plaintiffs and counter-defendants. and answer defendant's counter-claim in conformity with the Federal Rules of Court Procedure.

December 5th, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed December 5, 1949.

Not issued at request of counsel.

[Title of District Court and Cause.]

MOTION TO VACATE ORDER OR IN THE
ALTERNATIVE TO DISMISS COUNTER-
CLAIM

Come Now Lester F. Hinz and Robert E. Kerr, named as counter-defendants in the above-entitled action, and request this Court for an order vacating the order of December 5, 1949, authorizing issuance of summons against said Lester F. Hinz and Robert E. Kerr or, in the alternative, for an order dismissing the counterclaim against said Lester F. Hinz and Robert E. Kerr.

The grounds of said motion for an order vacating the order of December 5, 1949, are: -

I.

That said order is improper under Rule 13(h), Federal Rules of Civil Procedure.

II.

That the request for said order of December 5, 1949, was unsupported by any factual showing demonstrating that said Lester F. Hinz or Robert E. Kerr are necessary parties to the granting of complete relief to defendant.

The grounds of said motion for an order to dismiss are:

1. That the counterclaim does not state facts to constitute a cause of action against said Lester F. Hinz or Robert E. Kerr.

2. That the counterclaim sets forth no allegations of fact to establish individual trade-mark infringement by said Lester F. Hinz or Robert E. Kerr.

3. That the deposition of Allan F. Rowland, Secretary-Treasurer of defendant Co. establishes that there are no facts in support of the counterclaim which can raise a justiciable issue between defendant and said Lester F. Hinz or Robert E. Kerr.

This motion will be based upon all of the papers on file herein and the deposition of Allan F. Rowland and affidavits of Lester F. Hinz, Robert E.

Kerr and Elise Juster and the memorandum in support of said motion on file herein.

Dated December 27, 1949.

MELLIN AND HANSCOM,

By /s/ JACK E. HURSH.

[Endorsed]: Filed December 27, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF LESTER F. HINZ

(Jan. 20, 1950)

State of California,

City and County of San Francisco—ss.

Lester F. Hinz, being first duly sworn, deposes and says:

That he is the Lester F. Hinz who previously made an affidavit in this action, dated November 18, 1949, on file herein; that all of the allegations made therein are true and correct with the exception that affiant in his previous affidavit made an error in the ownership of stock in plaintiff, Dollcraft Co.; that said prior affidavit, starting on page 2, line 18 after the comma, to page 2, line 21 to semi-colon, should read; "was issued fifteen (15) shares, Lester F. Hinz; fifteen (15) shares, Robert E. Kerr; ten (10) shares, Richard Mollison; ten (10) shares Maurice Juster and ten (10) shares, Elise Juster."

That thereafter additional financing of said plaintiff company was necessary and in return for said financing on February 16, 1949, additional stock in plaintiff corporation was issued as follows: Lester F. Hinz, seventeen (17) shares and Robert E. Kerr, thirteen (13) shares; that an additional correction should be made to the said affidavit of November 18, 1949, on page 4, line 7, after the comma, to page 4, line 15, to the semi-colon; that said affidavit should at that point read as follows. "that in March, 1945, Lester F. Hinz, affiant, was approached by Robert E. Kerr who was seeking to obtain bisque dolls so that said Robert E. Kerr and an associate, Robert Patterson, could engage in the business of decorating and selling undressed dolls which had become difficult to obtain because of war conditions and the cessation of the imports of such dolls; that it was some time in May, 1945, when it was agreed by and between affiant and said Robert E. Kerr that they would form a co-partnership, known as Kerr & Hinz, for the purpose of decorating, finishing and packaging doll bodies and that said Robert Patterson would have exclusive sales rights to the products produced by said Kerr & Hinz;"

That said errors in said prior affidavit were made through inadvertence or mistake and were not intentional.

/s/ LESTER F. HINZ.

Subscribed and sworn to before me this 20th day of January, 1950.

[Seal] /s/ HELEN KETTERBAUGH,
Notary Public in and for the County of San Francisco, State of California.

[Endorsed]: Filed February 4, 1950.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 6th day of February, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTE ORDER

This case came on regularly this day for hearing on motion to vacate order, or in the alternative, to dismiss counter-claim. After hearing J. Hursh, Esq., for plaintiff, and H. Orr, Esq., for defendant, it is Ordered that said motion be denied without prejudice to renewal at time of trial.

[Title of District Court and Cause.]

ANSWER TO COUNTER-CLAIM

Come now the plaintiffs-counter-defendants above-named and, for their answer to the counter-claim herein, admit, deny and aver as follows:

I.

Answering Paragraph I of the counter-claim, plaintiffs-counter-defendants admit the allegations therein contained.

II.

Answering Paragraph II of the counter-claim, plaintiffs-counter-defendants admit the allegations therein contained.

III.

Answering Paragraph III of the counter-claim, plaintiffs-counter-defendants admit that Lester F. Hinz is a resident of Los Gatos, County of Santa Clara, State of California; and is President of plaintiff, Dollcraft Co., and that said Lester F. Hinz owns the Myers Ceramic Products Co., and is a copartner in Kerr and Hinz Doll Company, both of which organizations have a place of business in Santa Clara, County of Santa Clara, State of California; but except for the allegations herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations contained in said Paragraph III.

IV.

Answering Paragraph IV of the counter-claim,

plaintiffs-counter-defendants admit that Robert E. Kerr is a resident of San Carlos, County of San Mateo, State of California; and is Vice-President of plaintiff, Dollcraft Co., and that said Robert E. Kerr is a copartner in the firm of Kerr and Hinz Doll Company; but except for the matters herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations contained in said Paragraph IV.

V.

Answering Paragraph V of the counter-claim, plaintiffs-counter-defendants admit that the counter-claim is for alleged infringement of trade-mark rights alleged to be owned by defendant-counter-claimant and arising under the trade-mark laws of the United States; but except for the matter herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the allegations therein contained.

VI.

Answering Paragraph VI of the counter-claim, plaintiffs-counter-defendants admit that defendant-counter-claimant and its predecessors have been and now are engaged in the business of manufacturing and selling dressed dolls; but except for the matters herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations contained in said Paragraph VI.

VII.

Answering Paragraph VII of the counter-claim, plaintiffs-counter-defendants admit that the United States Patent Office issued the following trade-mark registrations:

"Red Riding Hood"	Registration No. 420,007
	March 26, 1946
"Little Miss Muffett" . . .	Registration No. 432,208
	August 26, 1947
"Little Bo-Peep"	Registration No. 395,454
	May 26, 1942
"Mistress Mary"	Registration No. 404,576
	Dec. 7, 1943
"Little Miss Donnett" . . .	Registration No. 404,586
	Dec. 7, 1943
"Curley Locks"	Registration No. 404,581
	Dec. 7, 1943
"Goldilocks"	Registration No. 395,451
	May 26, 1942
"Sugar and Spice"	Registration No. 403,240
	Sept. 14, 1943
"Storybook"	Registration No. 389,114
	July 22, 1941
"Fairyland Dolls"	Registration No. 438,495
	April 27, 1948
"June Girl"	Registration No. 403,261
	Sept. 14, 1943

Except for the matters herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations contained in said Paragraph VII.

VIII.

Answering Paragraph VIII of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

IX.

Answering Paragraph IX of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

X.

Answering Paragraph X of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XI.

Answering Paragraph XI of the counter-claim, plaintiffs-counter-defendants deny each and every, all and singular, the allegations contained in said Paragraph XI; and aver that plaintiff-counter-defendant, Dollcraft Co., has produced dolls depicting its conception of nursery rhyme characters and has identified said dolls with the nursery rhyme names which aptly describe the dolls.

XII.

Answering Paragraph XII of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XIII.

Answering Paragraph XIII of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XIV.

Answering Paragraph XIV of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XV.

Answering Paragraph XV of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XVI.

Answering Paragraph XVI of the counter-claim, plaintiffs-counter-defendants admit that Lester F. Hinz made and supplied to defendant-counter-claimant's predecessors bisque doll bodies during the period of approximately from January, 1943, to May, 1945; but except for the matters herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations contained in said Paragraph XVI.

XVII.

Answering Paragraph XVII of the counter-claim, plaintiffs-counter-defendants admit that Robert E. Kerr was employed by defendant-counter-claimant's predecessors during the period of approximately from January, 1941, to June, 1944; but except for the matters herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations contained in said Paragraph XVII.

XVIII.

Answering Paragraph XVIII of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XIX.

Answering Paragraph XIX of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XX.

Answering Paragraph XX of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

As Further and Separate Defenses Plaintiffs-Counter-Defendants Aver:

XXI.

That plaintiff-counter-defendant, Dollcraft Co., for many years last past has been and now is engaged in the business of designing, manufacturing and selling children's dolls of various types and designs, including a group of dolls which plaintiff-counter-defendant, Dollcraft Co., designates its "Fairyland Series" designed and decorated to depict and visually correspond with and represent various well-known characters referred to in fairy tales, Mother Goose and other nursery rhymes; for example:

"Red Riding Hood"

"Little Miss Muffett"

"Little Bo-Peep"

"Mistress Mary"

"Little Miss Donnett"

"Curley Locks"

"Goldilocks"

"Sugar and Spice"

XXII.

That the container for each of such dolls is inscribed with the well-known name of the character which it represents and depicts, and also on such container is prominently displayed the trade-mark and name of the plaintiff-counter-defendant, Dollcraft Co.

XXIII.

That plaintiff-counter-defendant, Dollcraft Co., has built up an extensive and lucrative business in such dolls so named, and has established and enviable and valuable good will therein, which business and good will is in excess of One Hundred Thousand Dollars (\$100,000.00).

XXIV.

That defendant-counter-claimant has contended and now contends that it has the exclusive right and monopoly of, designating dolls depicting and representing fairy tale, Mother Goose and other nursery rhyme characters by the well-known names given such characters in such fairy tale, Mother Goose and other nursery rhymes, and further contends that the names of such characters as given in such fairy tale, Mother Goose and other nursery rhymes are the exclusive property and exclusive trade-marks of this defendant-counter-claimant; the well-known names of such fairy tale, Mother Goose and other nursery rhyme characters so claimed to be the exclusive property and trade-marks of defendant-counter-claimant, among others, are as follows:

“Red Riding Hood”
“Little Miss Muffett”
“Little Bo-Peep”
“Mistress Mary”
“Little Miss Donnett”
“Curley Locks”
“Goldilocks”
“Sugar and Spice”

XXV.

That defendant-counter-claimant, with the calculated intent and purpose of destroying the good will and business of the plaintiff-counter-defendant, Dollcraft Co., in its aforesaid dolls, has heretofore, in writing, notified valuable customers of plaintiff-counter-defendant, Dollcraft Co., to forthwith desist from naming, designating or advertising plaintiff-counter-defendant, Dollcraft Co.’s, such dolls by the said well-known fairy tale, Mother Goose and nursery rhyme names of the characters which such dolls depict and represent, as aforesaid, which names are as follows:

“Red Riding Hood”
“Little Miss Muffett”
“Little Bo-Peep”
“Mistress Mary”
“Little Miss Donnett”
“Curley Locks”
“Goldilocks”
“Sugar and Spice”

and has threatened said customers with litigation in

the event that they refused to forthwith and immediately desist from so doing.

XXVI.

That defendant-counter-claimant, well knowing that it had no exclusive right to use the said names of the said characters in fairy tales, story books, Mother Goose and other nursery rhymes, and with the intent to deceive and defraud the customers of plaintiff-counter-defendant, Dollcraft Co., and to defraud the plaintiff-counter-defendant, Dollcraft Co., and to destroy plaintiff-counter-defendant, Dollcraft Co.'s, said business, did threaten such customers with litigation because of the use by such customers of the names of characters in fairy tales, story books, Mother Goose and other nursery rhymes in connection with dolls representing and depicting such characters.

XXVII.

That plaintiff-counter-defendant, Dollcraft Co., is informed and believes and on information and belief alleges that such notification and threatening, as aforesaid, by defendant-counter-claimant of the said plaintiff-counter-defendant, Dollcraft Co.'s, valuable customers, is part of a calculated plan on the part of the defendant-counter-claimant to unlawfully destroy the plaintiff-counter-defendant, Dollcraft Co.'s, said business in said dolls, and thereby unlawfully eliminate legal and proper competition by the plaintiff-counter-defendant, Dollcraft Co.

XXVIII.

That plaintiff-counter-defendant, Dollcraft Co., is informed and believes and on information and belief alleges that unless restrained by this Court, defendant-counter-claimant will continue to so improperly and unfairly compete with plaintiff-counter-defendant, Dollcraft Co., by threatening customers of the plaintiff-counter-defendant, Dollcraft Co., with litigation if they continue to sell the doll products of the plaintiff-counter-defendant, Dollcraft Co., all to the irreparable injury and damage of the plaintiff-counter-defendant, Dollcraft Co.

XXIX.

That the said acts of the defendant-counter-claimant in so harrassing plaintiff-counter-defendant, Dollcraft Co., by threatening the customers of the plaintiff-counter-defendant, Dollcraft Co., with litigation because of their advertising and sale of plaintiff-counter-defendant Dollcraft Co.'s said doll products, as aforesaid, constitute acts of unfair competition in trade, and such acts have diminished the good will and business of the plaintiff-counter-defendant, Dollcraft Co., and plaintiff-counter-defendant, Dollcraft Co. has been damaged by such acts of unfair competition by defendant-counter-claimant in an amount which plaintiff-counter-defendant, Dollcraft Co., cannot at this time accurately determine, but is informed and believes and on information and belief alleges is in an amount in excess of Ten Thousand Dollars (\$10,000.00).

XXX.

That plaintiff-counter-defendant, Dollcraft Co., is informed and believes and on information and belief alleges that each and every of the said trade-mark registrations claimed to be owned by the defendant-counter-claimant and heretofore set out herein are invalid and were fraudulently and unlawfully obtained, in that the alleged words or phrases so registered are not trade-marks and are incapable of being exclusively appropriated.

XXXI.

That plaintiff-counter-defendant, Dollcraft Co., is informed and believes and on information and belief alleges that unless such trade-mark registrations as heretofore set forth are declared to be invalid by this Court, the defendant-counter-claimant will continue to hold itself out to the trade as being entitled to the exclusive use of the words and phrases claimed to be trade-marks in such registrations, and will continue to threaten the trade with litigation should the trade use the names of characters in well-known fairy tale, Mother Goose and nursery rhyme names to identify dolls depicting and representing such characters, all to the injury and damage of the plaintiff-counter-defendant, Dollcraft Co.

XXXII.

That when the names of the various characters in fairy tales, story books, Mother Goose and other nursery rhymes are used in connection with dolls depicting and representing such characters, such

names are not used in a trade-mark sense but merely in a descriptive and primary sense.

XXXIII.

That the names of the various characters in fairy tales, story books, Mother Goose and other nursery rhymes, when used to designate and identify such characters, are *publici juris* and incapable of being exclusively appropriated by defendant-counter-claimant as its trade-marks for dolls depicting and representing such characters.

XXXIV.

That the names of the various characters in fairy tales, story books, Mother Goose and other nursery rhymes, when applied to dolls depicting and representing such characters, are clearly descriptive and are not capable of being lawfully exclusively appropriated as trade-marks or trade names.

XXXV.

That plaintiff-counter-defendant, Dollcraft Co., does not use the fairy tale, Mother Goose and other nursery rhyme names of characters which its dolls depict and represent as trade-marks or trade names, but uses said names in their primary sense to describe such dolls.

XXXVI.

That plaintiff-counter-defendant, Dollcraft Co., has not infringed upon any trade-mark rights of defendant-counter-claimant.

Wherefore Plaintiffs-Counter-Defendants Pray:

1. For a judgment dismissing the counter-claim.
2. That the Court adjudge and declare that the plaintiffs-counter-defendants have not infringed any trade-mark rights of the defendant-counter-claimant.
3. That the Court adjudge and declare that the plaintiffs-counter-defendants have not unfairly competed with the defendant-counter-claimant.
4. That the Court adjudge and declare that the defendant-counter-claimant has committed acts of unfair competition against the plaintiffs-counter-defendants.
5. That the Court declare the following trade-mark registrations to be invalid and of no legal force and effect:
 - “Red Riding Hood” Registration No. 420,007
March 26, 1946
 - “Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947
 - “Little Bo-Peep” Registration No. 395,454
May 26, 1942
 - “Mistress Mary” Registration No. 404,576
Dec. 7, 1943
 - “Little Miss Donnett” . . . Registration No. 404,586
Dec. 7, 1943
 - “Curley Locks” Registration No. 404,581
Dec. 7, 1943
 - “Goldilocks” Registration No. 395,451
May 26, 1942

“Sugar and Spice” Registration No. 403,240
Sept. 14, 1943

“Storybook” Registration No. 389,114
July 22, 1941

6. That the Court adjudge and declare that the defendant-counter-claimant has no exclusive right to designate dolls representing the following characters in fairy tale, Mother Goose and other nursery rhymes by the well-known names given them in such fairy tale, Mother Goose and other nursery rhymes:

“Red Riding Hood”

“Little Miss Muffett”

“Little Bo-Peep”

“Mistress Mary”

“Little Miss Donnett”

“Curley Locks”

“Goldilocks”

“Sugar and Spice”

7. That plaintiffs-counter-defendants be awarded the sum of Twenty-five Thousand Dollars (\$25,000.00) as exemplary damages for the malicious, wanton and unfair interference with the business of plaintiffs-counter-defendants.

8. For an accounting of the actual damages sustained by the plaintiffs-counter-defendants because of the acts of unfair competition committed by this defendant-counter-claimant.

9. That plaintiffs-counter-defendants have their costs and disbursements herein.

10. For a permanent injunction enjoining the defendant-counter-claimant, its associates, partners, attorneys, clerks, servants, agents, employees and confederates, and all in privity with them, and each of them,

(a) from notifying any of plaintiffs-counter-defendants' customers, dealers or any present or prospective sellers, dealers or users of plaintiffs-counter-defendants' aforesaid dolls that the sale, offering for sale or advertisement of plaintiffs-counter-defendants' said dolls violates any rights of this defendant-counter-claimant;

(b) from notifying any of plaintiffs-counter-defendants' customers, dealers or any present or prospective sellers, dealers or users of plaintiffs-counter-defendants' aforesaid dolls that the defendant-counter-claimant has the exclusive right to designate dolls by any of the aforesaid names;

(c) from notifying any of plaintiffs-counter-defendants' customers, dealers or any present or prospective sellers, dealers or users of plaintiffs-counter-defendants' aforesaid dolls that they will be sued for trade-mark infringement in the event that they sell, offer for sale or advertise any of plaintiffs-counter-defendants' aforesaid dolls;

(d) from commencing in this or in any other Court against any of the customers or dealers or any prospective customer or dealer of plaintiffs-counter-defendants any suit for alleged trade-mark infringement or unfair competition because of the selling, offering for sale, or advertising any of plaintiffs-counter-defendants' dolls herein set forth.

11. That plaintiffs-counter-defendants shall have such other, further or different relief as the Court may deem appropriate in the premises.

Dated this 15th day of February, 1950.

MELLIN, HANSCOM &
HURSH,

By /s/ JACK E. HURSH,
Attorneys for Plaintiffs-
Counter-Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 15, 1950.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Actions seeking to determine the validity of certain trade-marks, for injunctive relief because of trade-mark infringements and unfair competition, for damages and for other relief. Judgment in accordance with opinion.

Mellin, Hanscom & Hursh, Oscar A. Mellin, Leroy Hanscom, and Jack E. Hursh, all of San Francisco, California, attorneys for plaintiffs-counter-defendants.

Hugh N. Orr and William G. McKay, both of San Francisco, California, attorneys for defendant-counter-claimant.

Roche, Chief Judge:

By this action plaintiffs seek the cancellation of

certain trade-marks registered by the defendant in the U. S. Patent Office, injunctive relief, damages and other relief. Defendant counter-claims, seeking relief from trade-mark infringement, injunctive relief, damages and other relief.

Plaintiff and counter-defendant Dollcraft Co. is now, and has been since 1946, a manufacturer and seller of miniature, dressed dolls. In 1948, Dollcraft began producing a series of eight dolls, each named "Who Am I?" and each dressed to represent some familiar character in children's fiction, such as "Red Riding Hood," "Little Miss Muffett" and "Little Bo-Peep." Shortly after its introduction this series was named the "Fairyland Series," a name apparently adopted from the short verse printed on Dollcraft's price lists and brochures of that period, and which contained the lines:

"I Am a Little Friend of Yours, Fairyland
Is Where I Dwell."

Within the same year of 1948, this series was increased to twelve dolls, each identified by the name of a particular fictional character or nursery rhyme personification which the doll was dressed to represent and comprising "Red Riding Hood," "Little Miss Muffett," "Little Miss Donnett," "Little Bo-Peep," "Mistress Mary," "Alice in Wonderland," "Rapunzel," "Gretel," "Curly Locks," "Goldilocks," "Sugar and Spice," and "Bessie Brooks."

Dollcraft also makes a doll dressed as a bride which is sold under the name of "June Bride."

Dollcraft first packaged its dolls in individual cardboard boxes which had a red top and a white

bottom. It later began using, and now uses, a box consisting of a white bottom with a transparent, acetate top and also, for one series of dolls, individual, glass bottle containers.

During the first few months of its existence, Dollcraft applied no names of identification to its products. Beginning in 1946 or 1947, it applied to the red-topped boxes a gummed label or seal on which the following words appeared: "Globe Trotters. Doll-Craft Co., San Francisco, California." Later, the boxes were rubber-stamped with the words, "Dollcraft Company, Santa Clara, California." The lids of the glass containers have, since they were first used in 1949, contained the words, "Dolls With a Story by Dollcraft, Santa Clara, California."

Defendant and counter-claimant Nancy Ann Storybook Dolls, Inc., (hereafter referred to as Nancy Ann) is now, and has been since 1937, also a manufacturer and seller of miniature, dressed dolls.

Since 1941 Nancy Ann has applied the words "Storybook Dolls by Nancy Ann" to its complete line of dolls. Nancy Ann registered the word "Storybook" with the U. S. Patent Office in 1941 as a trade-mark for dolls, doll clothes and doll furniture and the word "Story" in 1950 as a trade-mark for dressed dolls.

Nancy Ann has, since its inception, made and sold certain dolls to which it applies the names of "Red Riding Hood," "Little Miss Muffet," "Little Bo-Peep," "Mistress Mary," "Curly Locks," and

“Goldilocks.” It has also made and sold a doll named “Sugar and Spice” since about 1940 and one named “Little Miss Donnett” since about 1941. Nancy Ann has registered all of these names with the U. S. Patent Office, between 1942 and 1947, as trade-marks for dolls and doll clothes or for dressed dolls. From about 1938 until about 1946, all of its dolls of these names were sold under the series name of “Storybook Series” (spelled as “Story Book” until about 1940). Since about 1946, these same dolls have been included within either the “Fairytale Series,” the “Fairylend Series,” or the “Mother Goose Series.” The name “Fairylend” was registered with the U. S. Patent Office in 1948, as a trade-mark for dressed dolls.

Since about 1941, Nancy Ann has also made a doll sold under the name of “June Girl,” which name was registered in the U. S. Patent Office in 1943 as a trade-mark for dolls and doll clothes.

Nancy Ann packages its dolls in individual, white, cardboard boxes, printed on which, in multiple, diagonal lines, are the words “Nancy Ann Storybook Dolls,” between which lines are additional, parallel lines of large polka dots, with both the words and the polka dots printed in a single color.

In October, 1949, two retail stores advertised Dollcraft dolls, including “Red Riding Hood,” “Little Bo-Peep,” and “Sugar and Spice,” under the names of “Story Dolls” and “Story Book Dolls.” Immediately thereafter, Nancy Ann served notices of alleged trade-mark infringements upon Dollcraft and certain customers of Dollcraft, in-

cluding the two stores which had so advertised. With such notice, Nancy Ann demanded that the infringements and unfair competition cease and that accounting be made for all profits derived from such practices.

Dollcraft thereupon instituted this suit, denying that the names "Red Riding Hood," "Little Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Curly Lock," "Goldilocks," "Sugar and Spice," "Little Miss Donnett," "June Girl," "Story," "Storybook" and "Fairyland" are valid trade-marks which Nancy Ann may exclusively appropriate and alleging, therefore, that Nancy Ann's notices of infringements constitute unfair competition. Nancy Ann relies on the validity of all of its registered trade-marks which are in issue here.

The issue for decision is whether Nancy Ann is entitled to the exclusive use of the names involved, either by reason of their being valid trade-marks or under the doctrine of secondary meaning.

While the registration of a name or term as a trade-mark raises a presumption of its legality, *Brooks Bros. v. Brooks Clothing of Calif.*, 60 F.S. 442, 447, 65 U.S.P.Q. 301, 308, the mere registration does not establish that name or term as a valid trade-mark, for such presumption is rebuttable. *National Nu Grape Co. v. Guest*, 164 F. (2d) 874, 876.

The purpose of a trade-mark is to distinguish the goods of one person from those of another, *Standard Paint Co. v. Trinidad*, 220 U. S. 447, 453, and its primary and proper function is to identify the

origin or ownership of the article to which it is affixed. *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 412. It must be of such a nature as to permit of an exclusive appropriation by one person, *Barton v. Rex-Oil Co.*, 2 F. (2d) 402, 403, for unless the trade-mark performs its proper function, neither can the first adopter of it be injured by any appropriation or imitation of it by others, nor can the public be deceived. *Canal Co. v. Clark*, 80 U. S. 311, 323.

The names "Fairyländ" and "Sugar and Spice" serve such purpose and function and are capable of exclusive appropriation; they are, therefore, valid trade-marks.

"Sugar and Spice" is a phrase abstracted from an old, familiar, nursery rhyme, possessing a meaning in its context, but none when used as the name of a doll. "Fairyländ" means the land or abode of fairies, who are imaginary, supernatural beings; Nancy Ann uses this word as a name for dolls which, while they may portray fictional characters, are neither representations nor likenesses of fairies. At most, these names may be suggestive (see *Nims on Unfair Competition*, 3d Ed., §201), but they are not descriptive; they possess, in their use by Nancy Ann, only connotation and not denotation; they are arbitrary and fanciful names and thus valid trade-marks. *Palmer v. Gulf Pub. Co.*, 79 F.S. 731, 734; see also *Stork Restaurant v. Sahati*, 166 F. (2d) 348, 355, 76 U.S.P.Q. 374, 379.

The leading case of *Canal Co. v. Clark*, *supra*, at p. 323, establishes two rules which must not be

overlooked: "No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection." This Court finds that all of the other names claimed and registered as trade-marks by Nancy Ann, and which are in issue here, are incapable, inherently and because of the two rules just expressed, of functioning as valid trade-marks in their application by Nancy Ann.

Dollcraft claims the right to use the names of "Red Riding Hood," "Little Bo-Peep," "Little Miss Muffett," "Mistress Mary," "Little Miss Donnett," "Curly Locks," and "Goldilocks" because such names are descriptive of its dolls. Nancy Ann, while admitting the right of Dollcraft to make dolls portraying such fictional characters, claims the exclusive right to the use of these names as valid trade-marks.

The dolls produced by each party show themselves to have been designed, created and dressed so as to be the likeness of the fictional character whose name they bear. Each doll of such name is a manifestation of the fictional character itself, whose name serves to identify and describe such doll. These

names, as so applied, are descriptive; their use belongs to everyone and Nancy Ann cannot be given the right of their exclusive appropriation.

Nancy Ann claims that "June Girl" is infringed by Dollcraft's use of the name "June Bride," contending, even, that the word "June" may not be so used by others. The "June Girl" doll, on examination, shows itself to be a conceptual representation of a girl dressed for the month of June. It is not dressed in a bridal costume, rather it is clothed in light, summery dress, appropriate to an embodiment of the name itself. The name denotes the doll, not the manufacturer; it is a descriptive name, invalid as a trade-mark. Even were this Court to find "June Girl" a valid trade-mark, however, there is insufficient evidence to hold that "June Bride" constitutes either an infringement of "June Girl" or an unfair use of the word "June."

"Story" or "Story Book" properly serve as generic names for all that class of dolls which portray or represent fictional characters, as does the name "Dolls With a Story." Each of these names which is used by Nancy Ann serves the adjectival function of correctly describing such a class of dolls and both are likewise invalid as trade-marks.

As to all of the above names here held invalid as trade-marks, the language of the Canal Co. case, *supra*, at p. 328 and p. 324, may be paraphrased to say that the dolls produced by Nancy Ann are as truly described by these names, as are the dolls

produced by Dollcraft or by Hallmark Cards.¹ The names are descriptive ones which do not point to the origin or ownership, nor indicate in the slightest degree the person, natural or artificial, who manufactured such dolls or brought them to market. As so applied, all of the above names are incapable of performing the function of a trade-mark; they are not susceptible of exclusive appropriation by one party for they are names which, from the nature of the fact they are used to signify, may be employed by others with equal truth and with equal right for the same purpose.

The evidence is insufficient to hold that any of these names, found not to be trade-marks proper, have acquired a secondary meaning denoting Nancy Ann as the source of the dolls to which they are applied.

Evidence that a retailer sold Dollcraft dolls under the name of Story Book Dolls is proof only of the sales and not of the issue in question. Advertising is the effort expended in the attempted achievement and not the achievement of the alleged result (i.e., secondary meaning); a large sales volume may be no more than the success resulting from methods of sales promotion. These factors, as well as the fact of the length of time that Nancy Ann has used such names, in the absence of sufficient evidence tending to show that such names have become known to the public or to

¹Introduced into evidence were certain paper dolls manufactured by Hallmark Cards, some of which are named "Little Miss Muffett," "Little Bo-Peep," and "Little Red Riding Hood."

dealers as denoting a product of Nancy Ann's, are found not to meet the burden of proof necessary to establish secondary meanings.

Because both parties are producing dolls of similar size and common conception, there is a natural resemblance between their products. Lacking, however, are the usual indicia of fraud or palming off on the part of Dollcraft. The evidence fails to show that Dollcraft has represented, by marks, signs, labels, colors, packages, or in any other way, that its dolls are manufactured by Nancy Ann; on the contrary, the evidence shows that Dollcraft identifies its products by its own name, clearly and unmistakably. It may be said of Dollcraft's use of these names (here found to be descriptive) which have been in prior use by Nancy Ann, " * * * that the use by a second producer, in describing truthfully his product, of a name or combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth." *Canal Co. v. Clark*, *supra*, at p. 327. Since it is found that the dissimilarities outweigh the similarities of their products and since fair competition is to be encouraged, the Court finds no reason to enjoin Dollcraft from the use of these descriptive names.

Under the circumstances, this Court is of the opinion that it would be inequitable to award an accounting in favor of, or against, either party.

In accordance with the foregoing and upon findings of fact and conclusions of law in accordance therewith, it is, therefore

Ordered:

(1) That the following trade-mark registrations be cancelled:

No. 389114—"Storybook"

395451—"Goldilocks"

395454—"Little Bo-Peep"

403261—"June Girl"

404576—"Mistress Mary"

404581—"Curly Locks"

404586—"Little Miss Donnett"

420077—"Red Riding Hood"

432208—"Little Miss Muffett"

525896—"Story";

(2) That there be issued a writ of injunction perpetually restraining plaintiffs from infringing the names "Sugar and Spice" and "Fairyland"; and

(3) That there be issued a writ of injunction perpetually restraining defendant from interfering with plaintiffs' use of those names which are here ordered cancelled as registered trade-marks.

Dated Nov. 30th, 1950.

/s/ MICHAL J. ROCHE,

Chief United States District
Judge.

[Endorsed]: Filed November 30, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 52 of the Federal Rules of Civil Procedure and Rule 5(e) of the Rules of Practice of the District Court of the United States for the Northern District of California, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1.

Plaintiff-counter-defendant, Dollcraft Co., is a corporation, duly organized and existing under and by virtue of the laws of the State of California and having its principal place of business at Santa Clara, County of Santa Clara, State of California.

2.

Plaintiff-counter-defendant, Lester F. Hinz, an individual, is a resident of Santa Clara County, State of California.

3.

Plaintiff-counter-defendant, Robert E. Kerr, an individual, is a resident of San Mateo County, State of California.

4.

Defendant-counter-claimant, Nancy Ann Story-book Dolls, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, State of California.

5.

Defendant-counter-claimant is the owner of all the right, title and interest in, to and under the following United States trade-mark registrations:

- “Red Riding Hood” Registration No. 420,007
March 26, 1946
- “Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947
- “Little Bo-Peep” Registration No. 395,454
May 26, 1942
- “Mistress Mary” Registration No. 404,576
December 7, 1943
- “Little Miss Donnett” . . . Registration No. 404,586
December 7, 1943
- “Curly Locks” Registration No. 404,581
December 7, 1943
- “Goldilocks” Registration No. 395,451
May 26, 1942
- “June Girl” Registration No. 403,261
September 14, 1943
- “Storybook” Registration No. 389,114
July 22, 1941
- “Story” Registration No. 525,896
June 6, 1950
- “Fairylend” Registration No. 438,495
April 27, 1948
- “Sugar and Spice” Registration No. 403,240
September 14, 1943

6.

The plaintiff-counter-defendant, Dollcraft Co., is now and has been since 1946, a manufacturer and

seller of miniature dressed and undressed bisque dolls.

7.

Plaintiff-counter-defendant, Dollcraft Co., in 1948 began producing a series of eight (8) dolls, each named "Who Am I?" and each dressed to represent a familiar storybook character in children's fiction, such as Red Riding Hood, Little Miss Muffett, and Bo-Peep.

8.

Within the same year, 1948, plaintiff-counter-defendant, Dollcraft Co., increased this series to twelve (12) dolls, each identified by the name of a particular storybook fictional character or nursery rhyme personification which the doll was dressed to represent and comprising "Red Riding Hood," "Little Miss Muffett," "Little Miss Donnett," "Little Bo-Peep," "Mistress Mary," "Alice in Wonderland," "Rapunzel," "Gretel," "Curly Locks," "Goldilocks," "Sugar and Spice," and "Bessie Brooks."

9.

Plaintiff-counter-defendant, Dollcraft Co., makes a doll dressed as a bride which is sold under the name of "June Bride."

10.

Defendant-counter-claimant is now and has been since 1937 a manufacturer and seller of miniature dressed dolls.

11.

Defendant-counter-claimant, since 1949, has ap-

plied the words "Storybook Dolls by Nancy Ann" to its complete line of dolls.

12.

Defendant-counter-claimant has, since its inception, made and sold certain dolls to which it applies the names "Red Riding Hood," "Little Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Curly Locks," and "Goldilocks," and since 1940 has made and sold a doll named "Sugar and Spice" and also since 1941 has made and sold a doll named "Little Miss Donnett."

13.

"Sugar and Spice" is a phrase abstracted from an old, familiar nursery rhyme, possessing a meaning in its context, but none when used as the name of a doll.

14.

Defendant-counter-claimant from 1938 until about 1946 sold dolls to which it applied the names "Red Riding Hood," "Little Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Curly Locks," "Goldilocks," "Sugar and Spice," and "Little Miss Donnett," under the series name of "Storybook Series" (spelled as "Story Book" until about 1940).

15.

Defendant-counter-claimant, since about 1941, has made and sold a doll under the name of "June Girl."

16.

The dolls produced by each party herein show

themselves to have been designed, created and dressed so as to be the likenesses of well-known fictional characters whose names they bear.

17.

Each doll bearing the trade-marks here in issue is a manifestation of the fictional character itself whose name serves to identify and describe such doll.

18.

"Story" and "Storybook" properly serve as generic names for all that class of dolls which portray or represent fictional characters, as does "Dolls With a Story."

19.

The use which defendant-counter-claimant makes of the words "Storybook Dolls" to identify the dolls indicate that such dolls represent characters in storybooks.

20.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story" are primarily descriptive and cannot be withdrawn from public use by adoption as a trade-mark.

21.

The defendant-counter-claimant's purpose in acquiring the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Rid-

ing Hood," "Little Miss Muffett," and "Story" to dolls was simply to describe the name of the particular character which said dolls were designed to portray and represent and were not applied to the dolls to serve in a trade-mark function.

22.

The names "Story" and "Storybook" used by defendant-counter-claimant serves the adjectival function of correctly describing such a class of dolls. The dolls produced by Nancy Ann, bearing the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story" are as truly described by these names as are the dolls produced by plaintiff-counter-defendant, Dollcraft Co., or by Hallmark Cards, Exhibit 56.

23.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," as used by defendant-counter-claimant on its dolls, do not point out the manufacturer of said dolls.

24.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story" are descriptive and do not point to the origin or owner-

ship nor indicate in the slightest degree the person, natural or artificial, who manufactured such dolls or brought them to market.

25.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story" were adopted by and applied to dolls by defendant-counter-claimant because the dolls to which they were applied in appearance simulated a well-known storybook character.

26.

Defendant-counter-claimant has failed to show that the primary significance of the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," in the minds of the consuming public, is not the character represented by the dolls bearing said names, but is the defendant-counter-claimant, the producer of said dolls.

27.

The "June Girl" doll produced by defendant-counter-claimant shows itself to be a conceptual representation of a girl dressed for the month of June, it not being dressed in a bridal costume, but rather it is clothed in light, summery dress appropriate to an embodiment of the name itself, and the name denotes the doll, not the manufacturer, and is a descriptive name.

28.

Even if the name "June Girl" was a valid trade-mark, there is insufficient evidence to establish that the name "June Bride" constitutes either an infringement of the trade-mark "June Girl" or an unfair use of the word "June."

29.

Plaintiff-counter-defendant, Dollcraft Co., first packaged its dolls in individual cardboard boxes which had a red top and white bottom. Later it began using and now uses a box with a white bottom and a transparent, acetate top and also, for one series of its dolls, uses individual glass bottle containers.

30.

Plaintiff-counter-defendant, Dollcraft Co., beginning in 1946 or 1947, applied to the red-topped boxes containing its dolls, a gummed label or seal on which the following words appeared: "Globe Trotters, Doll-Craft Co., San Francisco, California." Later the boxes were rubber-stamped with the words, "Dollcraft Company, Santa Clara, California." The lids of the glass containers have, since they were first used in 1949, contained the words, "Dolls With a Story by Dollcraft, Santa Clara, California."

31.

Defendant-counter-claimant packages its dolls in individual white cardboard boxes printed on which, in multiple diagonal lines, are the words, "Nancy Ann Storybook Dolls," between which lines are ad-

ditional parallel lines of large polka dots with both the words and the polka dots printed in a single color.

32.

The packages in which plaintiff-counter-defendant, Dollcraft Co., sells its dolls are clearly distinguishable from the packages in which defendant-counter-claimant sells its dolls.

33.

There is no likelihood of mistaking the packages of plaintiffs-counter-defendants for those of defendant-counter-claimant nor the origin of such packages.

34.

"Fairyland" means the land or abode of fairies, who are imaginary supernatural beings.

35.

Defendant-counter-claimant uses the word, "Fairyland," as the name for a series of dolls which, while they may portray fictional characters, are neither representations nor likenesses of fairies.

36.

The defendant-counter-claimant has failed to establish by any evidence that the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," have become known to the public or to dealers as denoting a product of defendant-counter-claimant.

37.

The evidence is insufficient to establish that the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," have acquired a secondary meaning denoting defendant-counter-claimant as the source of the dolls to which they are applied.

38.

Both parties hereto are producing dolls of similar size and common conception. There is a natural resemblance between their products which may result in mistake as to origin or ownership. No fraudulent representations with respect to the origin of the products of plaintiff-counter-defendant have been made.

39.

That the evidence fails to show any likelihood of confusion in the ultimate customers between the products of plaintiff-counter-defendant, Dollcraft Co., and the products of defendant-counter-claimant, Nancy Ann Storybook Dolls, Inc.

40.

There is no evidence that there was any confusion in the trade between the products of defendant-counter-claimant and the plaintiffs-counter-defendants.

41.

There is no evidence that there was any likelihood of confusion in the trade between the products

of defendant-counter-claimant and the plaintiffs-counter-defendants.

42.

In October, 1949, two retail stores advertised plaintiff-counter-defendant, Dollcraft Co.'s, dolls, including "Red Riding Hood," "Little Bo-Peep," and "Sugar and Spice" under the names of "Story Dolls" and "Story Book Dolls." Immediately thereafter, defendant-counter-claimant served notices of alleged trade-mark infringement upon plaintiff-counter-defendant, Dollcraft Co., and certain customers of said plaintiff-counter-defendant, including the two stores which had so advertised, demanding that plaintiff-counter-defendant, Dollcraft Co., and its customers cease their trade-mark infringement and unfair competition and account for all profits derived from such practices.

43.

There is no evidence in the record that plaintiffs-counter-defendants practiced any fraud against defendant-counter-claimant in the manufacture and sale of its doll products.

44.

There is no evidence in the record that plaintiff-counter-defendant, Dollcraft Co., has represented by marks, signs, labels, colors, packages or in any other way that its dolls are manufactured by defendant-counter-claimant; on the contrary, the evidence shows that plaintiff-counter-defendant, Dollcraft Co., identifies its products by its own name clearly and unmistakably.

45.

The evidence establishes that as between the products of plaintiff-counter-defendant, Dollcraft Co., and defendant-counter-claimant that the dissimilarities outweigh the similarities, and plaintiff-counter-defendant, Dollcraft Co., has not unfairly competed with defendant-counter-claimant and has the right to use the descriptive names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story."

46.

That the evidence establishes that the plaintiff-counter-defendant, Dollcraft Co., did not unfairly compete with defendant-counter-claimant.

47.

That the evidence establishes that plaintiff-counter-defendant, Lester F. Hinz, did not unfairly compete with defendant-counter-claimant.

48.

That the evidence establishes that the plaintiff-counter-defendant, Robert E. Kerr, did not unfairly compete with defendant-counter-claimant.

49.

That the evidence establishes that plaintiff-counter-defendant, Lester F. Hinz, did not infringe valid trade-mark rights of defendant-counter-claimant.

50.

That the evidence establishes that plaintiff-counter-defendant, Robert E. Kerr, did not infringe valid trade-mark rights of defendant-counter-claimant.

51.

That the evidence fails to establish that plaintiff-counter-defendant, Dollcraft Co., is the alter ego of plaintiffs-counter-defendants, Lester F. Hinz and Robert E. Kerr.

Conclusions of Law

1.

That prior to the filing of the complaint herein there existed between plaintiff-counter-defendant, Dollcraft Co., and defendant-counter-claimant a substantial actual and judiciable controversy regarding the validity of trade-mark registrations "Sugar and Spice," "Fairylend," "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," in suit herein, and the questionability of infringement acts of plaintiff-counter-defendant, Dollcraft Co.

2.

This Court has jurisdiction of the cause of action set out in the complaint and the cause of action set out in the counter-claim herein and that the same are founded upon the trade-mark laws of the United States, and jurisdiction is also conferred by Title

28, U. S. Judicial Code, Section 2201 (the Federal Declaratory Judgment Statute).

3.

This Court has jurisdiction of the parties.

4.

The purpose of a trade-mark is to distinguish the goods of one person from those of another, and its primary and proper function is to identify the origin or ownership of the article to which it is affixed.

5.

The function of a trade-mark is to facilitate the identification of the maker or the seller of the merchandise, and one of the indispensable basic requirements of a trade-mark is that it distinctly point out the maker of the article to which it is attached. The trade-marks "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," fail to do this, and therefore do not function as trade-marks.

6.

A trade-mark must be of such a nature as to permit of an exclusive appropriation by one person, for unless the trade-mark performs its proper function, neither can the first adopter of it be injured by any appropriation or imitation of it by others, nor can the public be deceived.

7.

To acquire the right to the exclusive use of a

name, device or symbol as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached. The defendant-counter-claimant failed to establish that the trade-marks "Story-book," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," were adopted for this purpose.

8.

While the registration of a name or term as a trade-mark raises a presumption of its legality, the mere registration does not establish that name or term as a valid trade-mark, for such presumption is rebuttable.

9.

The mere registration of the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," does not establish these names as valid trade-marks, for the presumption of validity is rebuttable and registrations such as those here in question are not valid when the term registered as a trade-mark is used merely as descriptive of the product, its qualities or characteristics, for such a mark does not advise the public that the article to which it is attached comes from a single source, and if it does so advise the public, if it is descriptive, the protection of the word as a valid trade-mark would be an infringement upon common speech, which would be legally improper.

10.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," as applied to the dolls here in question, are incapable of performing the function of a trade-mark and are not susceptible of exclusive appropriation by one party, for they are names, which, from the very nature of the fact they are used to signify, may be employed by others with equal truth and with equal right for the same purpose.

11.

Every manufacturer of dolls is entitled to make and sell his conception of storybook characters familiar to all from childhood, and also has the right to employ the character name which aptly describes said doll.

12.

"Story" and "Storybook" properly serve as generic names for all that class of dolls which portray or represent fictional characters as does the name "Dolls With a Story."

13.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," are invalid as trade-marks, because they are descriptive of the dolls to which they are applied.

14.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," being purely generic and descriptive of the products to which they are applied, no secondary meaning can attach thereto so as to give anyone the exclusive right to the use thereof.

15.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," as used by the defendant-counter-claimant, have not acquired a secondary meaning.

16.

The trade-mark registrations "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," are invalid.

17.

The trade-mark registrations "Sugar and Spice" and "Fairyland" are valid.

18.

Even if the name "June Girl" was a valid trade-mark, the use of "June Bride" by plaintiff-counter-defendant, Dollcraft Co., is not an infringement of registration No. 403,261, for "June Girl."

19.

The plaintiffs-counter-defendants have practiced no fraud against defendant-counter-claimant.

20.

That plaintiffs-counter-defendants have committed no acts of unfair competition against defendant-counter-claimant.

21.

The defendant-counter-claimant has not unfairly competed with plaintiffs-counter-defendants.

22.

The plaintiff-counter-defendant, Dollcraft Co., is not the alter ego of plaintiffs-counter-defendants, Lester F. Hinz or Robert E. Kerr.

23.

That no damages were proved by any of the parties hereto as against the other parties.

24.

Plaintiffs-counter-defendants are entitled to their costs and disbursements herein.

25.

That plaintiff-counter-defendant, Dollcraft Co., is entitled to cancellation of the following trade-mark registrations pursuant to provisions of 15 U.S.C.A. Sec. 1119:

No. 389,114—"Storybook"

395,451—"Goldilocks"

395,454—"Little Bo-Peep"

403,261—"June Girl"
404,576—"Mistress Mary"
404,581—"Curly Locks"
404,586—"Little Miss Donnett"
420,077—"Red Riding Hood"
432,208—"Little Miss Muffett"
525,896—"Story."

26.

That defendant-counter-claimant is entitled to an injunction perpetually restraining plaintiffs-counter-defendants from infringing the names "Sugar and Spice" and "Fairylend."

27.

That plaintiffs-counter-defendants are entitled to an injunction perpetually restraining defendant-counter-claimant from in any manner interfering with plaintiffs-counter-defendants' use of the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story."

Dated:

/s/ MICHAEL J. ROCHE,
Chief United States District
Judge.

Lodged December 12, 1950.

[Endorsed]: Filed December 19, 1950.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 29270—G

DOLLCRAFT CO., a Corporation; LESTER F.
HINZ, ROBERT E. KERR,

Plaintiffs-Counter-Defendants,

vs.

NANCY ANN STORYBOOK DOLLS, INC., a
Corporation,

Defendant-Counter-Claimant.

JUDGMENT

This cause having come on to be heard upon the issues raised by the Complaint, Answer to Complaint and Counter-claim, and Answer to Counter-claim, and the Court having filed its Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed:

I.

That plaintiff-counter-defendant, Dollcraft Co., is a corporation duly organized and existing under and by virtue of the laws of the State of California and has a place of business at Santa Clara, County of Santa Clara, State of California.

II.

That plaintiff-counter-defendant, Lester F. Hinz, an individual, is a resident of the County of Santa Clara, State of California.

III.

That plaintiff-counter-defendant, Robert E. Kerr, an individual, is a resident of the County of San Mateo, State of California.

IV.

That defendant - counter - claimant, Nancy Ann Storybook Dolls, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of business in the City and County of San Francisco, State of California.

V.

That this Court has jurisdiction of this cause and the parties.

VI.

That defendant-counter-claimant is the owner of the legal title to the following United States trademark registrations:

- “Red Riding Hood” Registration No. 420,007
March 26, 1946
- “Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947
- “Little Bo-Peep” Registration No. 395,454
May 26, 1942
- “Mistress Mary” Registration No. 404,576
December 7, 1943
- “Little Miss Donnett” . . . Registration No. 404,586
December 7, 1943
- “Curly Locks” Registration No. 404,581
December 7, 1943

“Goldilocks”	Registration No. 395,451
	May 26, 1942
“June Girl”	Registration No. 403,261
	September 14, 1943
“Storybook”	Registration No. 389,114
	July 22, 1941
“Story”	Registration No. 525,896
	June 6, 1950
“Fairyland”	Registration No. 438,495
	April 27, 1948
“Sugar and Spice”	Registration No. 403,240
	September 14, 1943

VII.

That trade-mark registrations No. 420,007, dated March 26, 1946; No. 432,208, dated August 26, 1947; No. 395,454, dated May 26, 1942; No. 404,576, dated December 7, 1943; No. 404,586, dated December 7, 1943; No. 404,581, dated December 7, 1943; No. 395,451, dated May 26, 1942; No. 403,261, dated September 14, 1943; No. 389,114, dated July 22, 1941, and No. 525,896, dated June 6, 1950, are invalid and void in law and the registrations thereof are hereby cancelled.

VIII.

That trade-mark registrations No. 403,240, dated September 14, 1943, and No. 438,495, dated April 27, 1948, are valid.

IX.

That defendant-counter-claimant has no trade-mark rights in the words “Red Riding Hood,”

“Little Miss Muffett,” “Little Bo-Peep,” “Mistress Mary,” “Little Miss Donnett,” “Curly Locks,” “Goldilocks,” “June Girl,” “Storybook,” and “Story.”

X.

That the use of the words “Red Riding Hood,” “Little Miss Muffett,” “Little Bo-Peep,” “Mistress Mary,” “Little Miss Donnett,” “Curly Locks,” “Goldilocks,” “June Girl,” “Storybook,” and “Story,” by plaintiffs-counter-defendants has not infringed any trade-mark rights of defendant-counter-claimant.

XI.

That the plaintiffs-counter-defendants have not unfairly competed with the defendant-counter-claimant.

XII.

That the defendant-counter-claimant has not unfairly competed with plaintiffs-counter-defendants.

XIII.

That no damages are awarded plaintiffs-counter-defendants as against the defendant-counter-claimant.

XIV.

That no damages are awarded defendant-counter-claimant as against plaintiffs-counter-defendants.

XV.

That a Writ of Injunction issue out of and under the seal of this Court, enjoining and restricting the defendant - counter - claimant, its associates, attor-

neys, employees, servants, agents, stockholders and all those in privity with it or them, from in any manner asserting any trade-mark rights in any of the words "Red Riding Hood," "Little Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Little Miss Donnett," "Curly Locks," "Goldilocks," "June Girl," "Storybook," and "Story," and in any manner interfering with the use of said words or any of them by plaintiffs-counter-defendants or their customers or prospective customers.

XVI.

That a Writ of Injunction issue out of and under the seal of this Court, enjoining the plaintiffs-counter-defendants, their associates, attorneys, employees, servants, agents and all those persons in privity with them from in any manner infringing the trade-mark rights of defendant-counter-claimant in its trade-marks "Sugar and Spice," No. 403,240, dated September 14, 1943, and "Fairyland," No. 438,495, dated April 27, 1948.

XVII.

That plaintiffs-counter-defendants recover from defendant-counter-claimant their costs and disbursements in this suit in the sum of of Two Hundred Fourteen and 50/100 Dollars (\$214.50) and have execution thereof.

Dated:

/s/ MICHAEL J. ROCHE,

Chief United States District
Judge.

Approved as to Form, Pursuant to Rule 5(e).

.....,
Attorney for Defendant-
Counter-Claimant.

Lodged December 12, 1950.

[Endorsed]: Filed December 19, 1950.

Entered December 20, 1950.

[Title of District Court and Cause.]

MOTIONS BY DEFENDANT - COUNTER-
CLAIMANT FOR: (A) NEW TRIAL OR
REHEARING, (B) TO AMEND FIND-
INGS, (C) TO AMEND JUDGMENT

Defendant-counter-complainant above named hereby
moves:

(A) For a New Trial of the Above-Entitled Ac-
tion; or, Alternatively, for a Rehearing of Said
Action.

The grounds for said motion are:

(1) The decision and judgment of the court is
contrary to the evidence.

(2) The decision and judgment of the court is
not supported by the evidence.

(3) The decision and judgment of the court does
not determine material issues raised by the plead-
ings and argued before the court, including the

issue of unfair competition pleaded and proved by defendant-counter-complainant.

In support of said motion defendant-counter-complainant alleges that the decision and judgment of the court is contrary to the evidence in that the evidence clearly shows that the marks

“Storybook”	.....No. 389114
“Goldilocks”	.....No. 395451
“Little Bo Peep”	.....No. 395454
“June Girl”	.....No. 403261
“Mistress Mary”	.....No. 404576
“Curly Locks”	.....No. 404576
“Little Miss Donnett”	.....No. 404586
“Red Riding Hood”	.....No. 420077
“Little Miss Muffett”	.....No. 432208
“Story”	.....No. 525896

and each of them have for many years been known and accepted by the trade as marks identifying the products upon which they are applied as products of the defendant-counter-complainant and its predecessors; and that said marks and each of them have acquired a secondary meaning, separate and distinct from the ordinary significance of the several terms, identifying the products to which they are variously applied as the products of defendant-counter-complainant and its predecessors. No evidence to the contrary is included in the record of the action.

(B) To Amend the Findings of Fact and Conclusions of Law as Follows:

(1) Section 11, change “since 1949” to—since

July 6, 1938—to conform to the evidence and the facts of the case.

(2) Strike out sections 18, 19, 20, 22, 23 and 24, and each of them because each is contrary to the evidence and the facts of the case.

(3) Strike out the last two lines of section 25, which read as follows: “because the dolls to which they were applied in appearance simulated a well-known storybook character.”

(4) Strike out the last line which reads “not the manufacturer, and is a descriptive name.”

(5) Strike out sections 28, 36 and 37 and each of them because each is contrary to the evidence and the facts of the case.

(6) Strike out the last sentence of section 38, reading: “No fraudulent representations with respect the origin of the products of plaintiff-counter-complainant have been made.”

(7) Strike out sections 39, 40, 43-51, inclusive, and each of them because each is contrary to the evidence and the facts of the case.

(8) Strike out the last sentence of section 5 of the conclusions of law, reading: “The trade-marks ‘Storybook,’ ‘Goldilocks,’ ‘Little Bo-Peep,’ ‘June Girl,’ ‘Mistress Mary,’ ‘Curly Locks,’ ‘Little Miss Donnett,’ ‘Red Riding Hood,’ ‘Little Miss Muffett,’ and ‘Story,’ fail to do this and therefore, do not function as trade-marks.”

(9) In section 7 of the conclusions of law, line

5, change "failed to establish" to—has proved——.

(10) Strike out sections 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, and 27, of the conclusions of law and each of them because they are not in conformity with the facts of the case and because it is neither necessary or proper in this case to so find.

(C) To Amend the Judgment as Follows:

(1) Section VII, next to last line, change "invalid" to—valid—; and strike out "are void in law and the registrations thereof are hereby cancelled."

(2) Strike out Sections IX, X, XI, XII, XV and XVII.

(3) Section XVI, last line, add, "Red Riding Hood," No. 420,007, March 26, 1946; "Little Miss Muffett," No. 432,208, August 26, 1947; "Little Bo-Peep," No. 395,454, May 26, 1942; "Mistress Mary," No. 404,576, December 7, 1943; "Little Miss Donnett," No. 404,586, December 7, 1943; "Curly Locks," No. 404,581, December 7, 1943; "Goldilocks," No. 395,451, May 26, 1942; "June Girl," No. 403,261, September 14, 1943; "Storybook," No. 389,114, July 22, 1941, and "Story," No. 525,896, June 6, 1950.

In support of said motions, defendant-counter-claimant will rely upon all of the pleadings and evidence included in the record of the case, and

upon the points and authorities set forth in the accompanying memorandum.

December 30, 1950.

NANCY ANN STORYBOOK
DOLLS, INC.

By /s/ HUGH N. ORR,
WM. G. McKAY,
Its Attorneys.

[Endorsed]: Filed December 30, 1950.

[Title of District Court and Cause.]

ORDER

It Is Hereby Ordered that defendant-counter-claimants' Motion for New Trial or Rehearing be denied.

It Is Further Ordered that Finding 11 be amended by deleting the date "1949," and inserting therefor the date "July 6, 1938."

It Is Further Ordered that the additional portions of defendant-counter-claimants' Motion to Amend Findings and Judgment be denied.

/s/ MICHAEL J. ROCHE,
Chief Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed January 26, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Nancy Ann Storybook Dolls, Inc., a corporation, defendant-counter-complainant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the decision of the United States District Court for the Northern District of California, Southern Division, dated and filed November 30, 1950, as to all of the issues involved therein, save and except the ruling of said court that the trade-marks "Fairyl-land Dolls," Registration No. 438,495, April 27, 1948, and "Sugar and Spice," Registration No. 403,240, September 14, 1943, are trade-marks validly registered in the United States Patent Office; and from the order of said United States District Court made and entered January 29, 1951, denying the motions of said Nancy Ann Storybook Dolls, Inc., defendant-counter-complainant dated December 30, 1950, for (A) a new trial or rehearing, (B) to amend findings, and (C) to amend judgment.

Dated February 27, 1951.

/s/ HUGH N. ORR,

/s/ WM. G. MacKAY,

Attorneys for Defendant-
Counter-Claimant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 27, 1951.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That we, Nancy Ann Storybook Dolls, Inc., as Principal, and United States Fidelity and Guaranty Company, a corporation duly incorporated under the laws of the State of Maryland, of Baltimore, Maryland, having an office and usual place of business at 444 California Street, San Francisco, California, as Surety, are held and firmly bound unto Dollcraft Co., Lester F. Hinz and Robert E. Kerr, in the full and just sum of Two Hundred, Fifty Dollars (\$250.00) to be paid to the said Dollcraft Co., Lester F. Hinz and Robert E. Kerr, their heirs, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 28th day of February, 1951.

Whereas, lately in the District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said Court between Dollcraft Co., a corporation; Lester F. Hinz; Robert E. Kerr; plaintiffs-counter-defendants, and Nancy Ann Storybook Dolls, Inc., a corporation, defendant-counter-claimant, a judgment was rendered against the said defendant-counter-claimant, and the said defendant-counter-claimant, Nancy Ann Storybook Dolls, Inc., a corporation, having filed in said Court a notice of appeal to

reverse the judgment in the aforesaid suit, and the order of said court denying the motions of said defendant-counter-claimant for (A) a new trial or rehearing, (B) to amend findings, and (C) to amend judgment, the said judgment having been entered on the 30th day of November, 1950; and said order denying said motions having been entered upon January 29, 1951;

Now the Condition of This Obligation Is Such, That if the said defendant-counter-claimant shall pay the costs if the appeal is dismissed or the judgment is affirmed or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be void; otherwise to remain in full force and virtue.

Dated February 28, 1951.

NANCY ANN STORYBOOK
DOLLS, INC.,

By /s/ A. L. ROWLAND,
Secretary-Treasurer,
Principal.

UNITED STATES FIDELITY
AND GUARANTY CO.,

[Seal] By /s/ JOHN E. HILL,
Attorney-in-Fact.

Acknowledgment of Signature.

State of California,
City and County of San Francisco—ss.

On this 28th day of February, 1951, before me, Ed. R. Abbott, a Notary Public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared A. L. Rowland, known to me to be the secretary and treasurer of the Corporation described in and that executed the within instrument, and also known to me to be the person who executed the within instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Seal] /s/ ED. R. ABBOTT,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires May 31, 1952.

State of California,
City and County of San Francisco—ss.

On February 28, 1951, before me, Dorothy A. Muhlig, a Notary Public in and for the City and County of San Francisco, personally appeared John E. Hill, known to me to be the person whose name is subscribed to the within instrument as the At-

torney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as Attorney-in-fact.

[Seal] /s/ DOROTHY A. MUHLIG,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires November 30, 1954.

[Endorsed]: Filed February 28, 1951.

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It is hereby stipulated that the time for filing appellants' record on appeal may and shall be extended thirty (30) days, to and including, April 29, 1951.

/s/ HUGH N. ORR,

/s/ WM. G. McKAY,

Attorneys for Defendant-
Counter-Claimant.

MELLIN, HANSCOM &
HURSH,

/s/ JACK E. HURSH,

Attorney for Appellee.

Dated March 29, 1950.

Approved:

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed March 30, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause therefore appearing, it is hereby ordered that the time for filing appellants' record on appeal in the above cause, may and shall be extended to May 27, 1951.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

Dated April 30, 1951.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Defendant-appellant in the above-entitled action, pursuant to the Federal Rules of Civil Procedure, hereby designates that the entire record and proceedings in the cause, including all papers therein save and except the briefs and memoranda of points and authorities submitted in behalf of the parties in connection with preliminary motions and the trial of the action, but including the transcript of all depositions and evidence produced at the trial be included in the Record of Appeal.

Dated April 30, 1951.

/s/ HUGH N. ORR,

Attorney for Nancy Ann
Storybook Dolls, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1951.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 29270

DOLLCRAFT CO., a Corporation; LESTER E.
HINZ, ROBERT E. KERR,

Plaintiffs-Counter-Defendants,

vs.

NANCY ANN STORYBOOK DOLLS, INC., a
Corporation,

Defendant-Counter-Claimant.

REPORTER'S TRANSCRIPT

Monday, August 21, 1950

Before: Hon. Michael J. Roche,
Judge.

Appearances:

For the Plaintiffs and Counter-Defendants:

MELLIN, HANSCOM & HURSH, by
OSCAR A. MELLIN, ESQ., and
JACK E. HURSH, ESQ.

For the Defendant and Counter-Claimant:

HUGH N. ORR, ESQ., and
WILLIAM G. McKAY, ESQ.

The Clerk: The case of Dollcraft Company, a
corporation, against Nancy Ann Storybook Dolls,
Incorporated, a corporation.

Mr. Orr: Ready.

Mr. Mellin: Ready.

The Court: Briefly, gentlemen, what is the matter before us this morning?

Mr. Mellin: Do you wish the plaintiff to make an opening statement at this time?

The Court: Yes.

Mr. Mellin: This is a trade-mark case. At this time, your Honor, if I may, I will hand you plaintiff's trial brief.

There are two complicated legal trade-mark questions involved and we have prepared a brief with authorities on which we will rely at the trial on those questions of law, and it might be that some of those will be argued during the course of the trial, and this may shorten it.

Briefly, the legal issue involved is whether or not certain trade-mark registrations are valid. Plaintiff has brought this suit by way of declaratory relief to ask this Court to declare these trade-marks invalid and to declare their registrations invalid under the authorities.

Briefly, the parties are—the plaintiff is the Dollcraft Company of Santa Clara, which is a corporation of [2*] California, and the defendant and trade-mark owner, is the Nancy Ann Storybook Dolls, Inc., of San Francisco.

The trade-marks principally involved are the names of fairyland or nursery rhyme or story book characters such as Little Red Riding Hood, Little Bo-Peep, and so forth. For example, the infringe-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

ment which the defendant has charged the plaintiffs is characterizing this doll dressed as Little Red Riding Hood as "Little Red Riding Hood." They registered these names some years ago, and the plaintiff was more or less the newcomer in the business. They started here, as the evidence will show, as a very small concern two or three years ago, and while at first they made dolls of the same characters, that is, Little Bo-Peep and Little Red Riding Hood, they started a series by calling them "Who Am I" and let the children or whoever the purchasers were guess their names from their natural character and depiction. Then they, as the evidence will show, commenced marking the containers with the doll's name, but also in addition with their own individual mark and the name of the producer. This went on for some time. It is a seasonal business, and just before the commencement of that season last year, before the Christmas season, the defendant circularized the plaintiff's customers with charges of infringement of their trade-mark registrations of these dolls. So we charged in the complaint that that is unfair competition and had the effect of destroying the plaintiff's business, or at least [3] appreciably. So this suit was promptly brought by the plaintiff asking this Court for relief.

We will show the Court that although these trade-marks were registered some years ago, that in their attempt to monopolize all of the names of the fairyland, nursery rhyme and storybook characters, there was some quasi litigation, we might

call it, in the Patent Office regarding the registration of similar names in recent years; and the Patent Office has now taken the stand, and so has the United States Court of Customs and Patent Appeals, that names such as these cannot be exclusively appropriated by anyone and although the Patent Office does not try to cancel the registrations, it will not accept the application of some other person.

This defendant was well aware for quite a considerable period prior to their attempt to frighten away competition that it was very probable that all the trade-mark registrations were invalid under that ruling by the Commissioner of Patents. So we say that it was done not with an intent to protect their legitimate rights but in an attempt to monopolize and use something which they had notice was not, as the Court of Customs and Patent Appeals recently held, a thing in which they had an exclusive proprietary interest.

To put the issues right before the Court, we will show, first, that these trade-marks are public property; that the courts have ruled that trade-marks such as these belong to the [4] public in general and cannot be exclusively appropriated by anyone. We will secondly show they are not used by the plaintiff or defendant in a trade-mark sense, that is, in the sense in which a trade-mark is supposed to designate the goods and the origin of the goods, rather than some characteristic or some quality or other descriptive or generic term of the goods.

So we say, first, they were not used in a trade-

mark sense as required by law; that is as the law books at a trade-mark; and secondly, that they are of such type that they cannot be exclusively appropriated by anyone. So, therefore, the registrations of the trade-marks are invalid and should be so declared by this Court.

Mr. Orr: I would like to say just a few words in reply. I have never been connected with a case in which there were fewer facts in dispute, in which the issues are more simple and more sharply defined or in which the equities are so clear.

I think, as a matter of background, it would be worthwhile to discuss briefly the history of the development of this particular industry. It started back in the middle '30s as the hobby of Miss Nancy Ann Abbott. She, as a hobby, began dressing dolls, and as she would visualize some character taken from the nursery rhymes or Mother Goose story books or from the fairy tales, she would dress that doll to embody her visualization of the particular character. They were attractive little dolls, made quite a hit with many of her friends, so much [5] so that her friends, including Mr. Rowland, who has since become her active associate, induced her to take it up as a commercial enterprise. So beginning along about 1936 or 1937 a corporation was formed, at that time called Nancy Ann Dressed Dolls, Inc., and undertook the manufacture on a commercial scale of these little dolls. After due investigation they selected various trade-marks to identify them as a trade-marked product. Among those trade-marks are the same story book char-

acters which Mr. Mellin mentioned a moment ago, and which are the most popular ones that they have. In addition there were names selected to identify series of dolls. There was a Mother Goose series, there was a Doll of the Month series, there was a Doll of the Day series, and various other series which covered a considerable number of dolls within a particular group. Within those groups there were lesser designations of various dolls. They were identified by their individual trade-mark, and those trade-marks have been used on dolls that have been extensively sold throughout the United States in enormous quantities in the past fifteen years. Those marks have come to be accepted by the trade and by the public in general as designating a product originating from the Nancy Ann organization.

Through the years, from the first organization of Nancy Ann Dressed Dolls, Inc., the organization was transferred for business reasons to a partnership in which the name was reduced [6] to Nancy Ann Dressed Dolls. The equitable ownership of the organization was exactly the same as it had been in the corporation which preceded it. Still more recently, another transformation has been made in the set-up and it has again been incorporated and the new name is Nancy Ann Storybook Dolls, Inc. The equitable ownership in the organization is exactly the same as it was when it started out; the management control has been the same throughout; the financial interests have been the same throughout. Throughout that whole period all of the dolls have been personally designed by Miss Abbott.

The business activities have been divided among the partners, to be carried primarily by Mr. Rowland who has acted as manager and the active business executive of the organization.

These dolls have been sold in very large quantities. From a very nominal production when it started, before the war, it had increased to a production of five thousand or more per day. During the war there was a period when materials were hard to get, difficult to get adequate supplies of this, that or the other, and some of the lines had to be temporarily discontinued. Throughout the war there was a very active production, and during most of the war there were produced five thousand or more per day. More recently, at the present time the production approached seven thousand dolls per day. There have been millions of these dolls sold throughout the United States and many of the foreign countries. [7]

Their policy throughout this whole enterprise has been to sell almost exclusively to the major department stores throughout the country—the Emporium, Marshall Field, Gimbel's—stores of that kind have bought in very great quantities and have popularized the dolls. Advertising has been comparatively small on the part of the Nancy Ann organization, but very extensive on the part of the users, that is, the outlets for these dolls. The department stores have advertised extensively through these years, and because of that advertising and because of the tremendous popularity of the dolls, they have claimed a special field of their own, a

field of very real quality, known as the Nancy Ann Storybook Dolls.

It started a vogue for collecting dolls. Little girls had never had a popular vogue as collectors. Little boys collected match covers or bottle caps or tops or marbles, but little girls did not have very much to collect. These little dolls designed to personify individual little characters that they had met in nursery rhymes and in story books appealed to them, and it set up a vogue for collecting the items, and that vogue extended not only to the little girls for whom they were originally created, but to the grown-up girls. Grown-up women made large collections of these dolls and it became a part of the plan of the organization to continue to add new items to these lines to supply the demand. That has constantly increased and it is still at high peak. [8]

As happens in a successful enterprise, there are a number of imitators. They have sprung up here, there and the other place.

Throughout this proceeding the Nancy Ann organization has made it their policy to select and apply to their dolls only those trade-marks which they could protect, and they did take appropriate action. They would make investigation and ascertain that a mark had not been in use or was not in use and they would seek protection in the Patent Office. In many cases registrations have been filed, and in all of the cases that are here involved in this case, registrations have been granted by the Patent Office to the Nancy Ann organization. Those

registrations are presently owned by the defendant in this action, who is also a counter-complainant.

Those registrations are entitled to a presumption of validity. They are issued by the Patent Office with that presumption. They also carry the presumption of ownership and use. Ownership and use we can very readily prove. The only issue then becomes as to their validity. As I say, those marks are issued with the presumption of validity. Added to that presumption there is the fact of continuous, extended use by the defendant ranging up to fifteen years.

In many cases oppositions arose in the Patent Office. In every case the Nancy Ann organization took all the appropriate action to defend and protect its rights. [9]

Some of these marks were registered only after opposition by others. For instance one of the marks "Little Miss Muffett" was opposed by an organization owning the registration of the word "Mary Muffett" used for little girls' clothes. That opposition was dismissed as being without merit and a registration of "Little Miss Muffett" was granted to the Nancy Ann organization.

In another case there was an interference involving the mark "Mother Goose." In that particular case the parties had made application for the registration of the mark "Mother Goose" for dolls. In the course of that interference it was determined that priority belonged to the Nancy Ann organization and the mark was registered.

Incidentally, in the course of that proceeding the other party, a party down in the southern part of the State named Ippolito, had purchased from a previous owner an old registration of the mark "Mother Goose" that had expired. The mark had become abandoned, had not been in use for a number of years at the time it was purchased by the Ippolito organization, and the Court of Patent Appeals held that all he purchased was the bare paper registration with no good will or no business, and that the mark had become abandoned and available for appropriation by the Nancy Ann organization, who did adopt it and has used it under the new registration.

Further instances of that kind occurred all the way down [10] the line.

Long after the war in 1946, the Dollcraft Organization appeared on the scene. It began in a very small way here out in the Richmond District and made in the apartment of two individuals, Mr. and Mrs. Juster. Those dolls were originally designated by marks including the names of little girls popularly used so that a little girl named Mary seeing the Mary doll in the store would be urged to buy the Mary doll, while Dorothy would want the Dorothy doll and Helen the Helen doll. That practice was continued and I think is still in force.

Later they added an additional line, a line of foreign dolls, as they were called, dolls dressed in the costumes of various countries—Scotland, Ireland, Austria, Spain, or where have you. Those

were sold with designations identifying their source, and in no case was it a mark which approached any of the trade-marks that have been appropriated and used by the Nancy Ann organization. A little later there was a series came out entitled the "Who Am I" series that was designated "Who Am I blank?" and there was no name applied to the price list, to the circulars or to the doll, merely "Who Am I?" and it was left to the little purchasers to make their own guess as to who that doll might be. That occurred while the organization was small, while it was conducted as a partnership by Mr. and Mrs. Juster and Mr. Mollison who was associated with them. [11]

Along in 1948 the Justers were endeavoring to make arrangements with Mr. Hinz and Mr. Kerr, who are also named as plaintiffs and co-cross-defendants in this action, to combine their interests and form a corporation which was known as Dollcraft Corporation.

Mr. Hinz is the owner of an organization called the Myers Ceramic Products Company located down near Santa Clara. In the early 1940's he was engaged by the Nancy Ann organization to make and sell to them the little bisque bodies which were used for decorating and dressing the dolls they were selling as Nancy Ann Storybook dolls. At the time Nancy Ann's organization had had difficulty in securing an adequate supply of little bisque bodies to meet the demands of their trade, and arrangements were made with Mr. Hinz to supply that demand. And for a matter of two or three years he did supply all the dolls that they needed

and Nancy Ann purchased all the doll bodies he could make.

Then, as sometimes happens, misunderstandings arose, and it was determined that the arrangement with Mr. Hinz should be discontinued and the Nancy Ann organization acquired a ceramic plant of their own in which they made the little bodies themselves. Mr. Hinz was a little disconcerted about that arrangement; a little incensed; thought that he had been treated badly. I think it will appear that he still carries a little resentment toward the Nancy Ann organization because of that [12] circumstance.

Joined with Mr. Hinz is a gentleman named Kerr. Mr. Kerr was an employee of the Nancy Ann organization. Mr. Kerr started with them as shipping clerk and occupied various positions with progressively increasing responsibility, until he had a pretty complete understanding and knowledge of the business and its activities and its values, and ultimately reached the point where he thought his responsibility and so forth should be still further increased beyond what the Nancy Ann organization could offer, and the relationship was terminated with Mr. Kerr leaving as a disgruntled employee.

During the formative years of the Nancy Ann organization there was a man named Patterson, who was their primary salesman, who sold the bulk of their dolls during the early years. The relationship was friendly for a number of years, and then it reached a point where there were differences of

opinion again, and in this case again there was a parting of the ways, with Mr. Patterson occupying the position of a disgruntled ex-agent or business agent or salesman.

Now somewhere in the picture—and I think the evidence will make it very clear—there developed a plan of action involving Mr. Patterson, Mr. Kerr and Mr. Hinz to avenge their wrongs at the hands of Nancy Ann, at the expense of Nancy Ann.

The Dollcraft Company originated, as I have said, by Mr. and Mrs. Juster, and it was conducted on a thoroughly [13] competitive basis for a number of years. They were induced to move their plant down into the same building that is occupied by the Myers Ceramic Company, which produces these doll bodies. Housed in that same building there is an organization known as Kerr & Hinz. That is a corporation that was organized for the purpose of decorating the dolls made by Myers Ceramic Company. They paint them, put on the eyes and the decorations, put the wigs on, place the doll bodies in condition to be dressed by the manufacturer. So Myers Ceramic Company, which is Mr. Hinz, makes and sells dolls to Kerr & Hinz, of which he is the primary and principal owner. They in turn decorate the doll bodies, and in turn sell them to Dollcraft, who in turn dress them and sell them, put them on the market.

The Dollcraft organization is listed by Dun & Bradstreet as of a value in the neighborhood of twenty or twenty-one thousand dollars. The Kerr

& Hinz organization is rated by Dun & Bradstreet in the neighborhood of something over a hundred thousand. The Myers Ceramic plant, which is the root of it, is rated at around \$850,000. The profits of the organization I imagine are apportioned in about that same ratio.

When this corporation was formed, the plant was moved down to the Myers Ceramic plant, and a change of policy immediately became apparent. Whereas previously the "Who Am I" series had had no name designated to identify the doll; there was no mark upon the doll, no mark upon the box, no mark upon [14] the price lists, no mark upon the little circulars that accompanied the doll to the customers, they adopted many of the marks that had been adopted and used by the Nancy Ann organization almost immediately afterwards. The records will show that pursuant to actions by the board of directors, which includes Mr. Hinz and Mr. Kerr, names were applied these dolls of the "Who Am I?" series, to designate Little Red Riding Hood, Little Miss Muffett, Little Bo-Peep, Curly Locks, Goldilocks, Sugar and Spice.

Everyone of those names had previously been adopted and used for years by the Nancy Ann organization and registrations of them had been granted by the Patent Office years before the Dollcraft organization came into being. That was the start. They carried on through the latter part of 1948 and into 1949, and in 1949 they came out with full force. They put out a new line of dolls which they identified among other things as the

dolls of the story line, not story book dolls, but dolls with a story.

Mr. Mellin: If your Honor please, there is no charge that we came out with story book dolls; that was the Macy ad. That is the ad you are referring to; that wasn't our ad.

Mr. Orr: I repeat, your Honor, the doll line that they put out they identified by the mark which they applied to the dolls themselves, and it appears on the cover of this bottle "Dolls With a Story." [15]

Mr. Mellin: I thought you said story book dolls.

Mr. Orr: I said not story book dolls, but dolls with a story. The suggestion is identical. They came out with a line in which there were eight in number in this particular group, I think, and they plainly marked on the bottle "Red Riding Hood," "Little Bo-Peep," "Sugar and Spice,"—the entire group very carefully and clearly and plainly marked with the trade-mark which had been used and registered by the Nancy Ann organization years before.

Those dolls in this bottle container were sold to the trade, we believe and the facts will show, with the intent and with the result, certainly, of inducing the misrepresentation, inducing the confusion which would result, and that confusion did result. Macy's right here in San Francisco came out with a quarter page ad announcing this new line not story book dolls but of story dolls, and listing in their ads many, many of these registered names which are owned by the Nancy Ann organization. They were sold not just at the department stores but to everybody that would stock a small number—drug stores,

a market out here handled meats, groceries, what-not, stocked them; liquor stores—any place where they could put a half dozen or a dozen of these dolls they were put.

This was brought to the attention of the Nancy Ann organization. Notices of infringement were promptly prepared and sent to the Dollcraft organization and to those users [16] whose use had come to our attention. Within I think it was a week or ten days after that notice was sent out, with no reply to that notice, we were served with a bill of complaint in this action seeking relief under the Declaratory Judgment Act to have it determined that all of those registrations issued by the United States Patent Office after due procedure, issued with all the presumptions attendant to issues of the United States Government, be declared invalid.

We submit, your Honor, that all the facts and circumstances of this situation point to a deliberate raid on the part of Messrs. Kerr & Hinz operating through and as Dollcraft organization, against the property rights, trade-marks and the good will of the Nancy Ann organization.

In this case most of the basic facts I think can be stipulated. There is no dispute as to the major facts. They admit that they made the dolls; they admit that they used the names; they admit the registrations have been granted by the United States Patent Office; if those marks are valid there is no argument against the matter of infringement.

Therefore the only issue would be as to validity. Added to that is the question of unfair competition. Nancy Ann feels that it has been very badly used and we have charged them with unfair competition.

We have not mentioned something. They have made a very extravagant statement in their bill of complaint charging [17] the procuring of these registrations by fraud or deceit—I don't know just the exact term, but involving fraud and deceit, of which I will be very anxious to see the proof.

So it boils down in a nutshell to who is competing unfairly with whom. We feel that the facts will show that there is no question that the victim of this unfair competition is the Nancy Ann organization, and when the proof is in we feel that the Court should grant the relief that we have prayed for in our cross-complaint.

Mr. Mellin: Proceed, your Honor?

The Court: Yes.

Mr. Mellin: Mr. Juster.

MAURICE JUSTER

called as a witness on behalf of the plaintiff, sworn:

The Clerk: Will you state your full name?

A. Maurice Juster.

Mr. Mellin: At this time, your Honor, I would like to offer a copy of the trade-mark registration 420,077, "Red Riding Hood," as plaintiff's Exhibit 1.

Mr. Orr: No objection.

The Court: It may be admitted and marked.

(Testimony of Maurice Juster.)

(Thereupon trade-mark registration No. 420,077 was marked plaintiff's Exhibit No. 1 and received in evidence.)

Mr. Mellin: I would like to offer a copy of trade-mark registration No. 432,208, "Little Miss Muffett," as plaintiff's [18] Exhibit No. 2.

The Court: Any objection?

Mr. Orr: No objection, your Honor. I will stipulate that all of these may be admitted without objection.

The Clerk: Plaintiff's Exhibit 2.

(Thereupon trade-mark registration 432,208 was marked plaintiff's Exhibit No. 2 and received in evidence.)

Mr. Mellin: I will offer trade-mark No. 395,454, "Little Bo-Peep," as plaintiff's Exhibit No. 3.

The Clerk: Plaintiff's Exhibit 3.

(Thereupon trade-mark registration No. 395,454 was received in evidence and marked plaintiff's Exhibit No. 3.)

Mr. Mellin: Copy of trade-mark registration 404,576, "Mistress Mary," as plaintiff's Exhibit No. 4.

The Clerk: Plaintiff's Exhibit 4.

(Thereupon trade-mark registration No. 404,576 was received in evidence and marked plaintiff's Exhibit No. 4.)

Mr. Mellin: I offer trade-mark registration No.

(Testimony of Maurice Juster.)

404,586, "Little Miss Donnett," as plaintiff's Exhibit No. 5.

The Clerk: Plaintiff's Exhibit 5.

(Thereupon trade-mark registration No. 404,586 was received in evidence and marked plaintiff's Exhibit No. 5.)

Mr. Mellin: I offer copy of trade-mark registration No. 404,581, "Curly Locks," as plaintiff's Exhibit No. 6.

(Thereupon trade-mark registration No. 404,581 was [19] received in evidence and marked plaintiff's Exhibit No. 6.)

Mr. Mellin: I offer copy of trade-mark registration No. 395,451, "Goldilocks," as plaintiff's Exhibit No. 7.

(Thereupon copy of trade-mark registration No. 395,451 was received in evidence and marked plaintiff's Exhibit No. 7.)

Mr. Mellin: I offer copy of trade-mark registration No. 403,240, "Sugar and Spice," as plaintiff's Exhibit No. 8.

(Thereupon copy of trade-mark registration No. 403,240 was received in evidence and marked plaintiff's Exhibit No. 8.)

Mr. Mellin: I offer trade-mark registration No. 389,114, "Storybook," as plaintiff's Exhibit No. 9.

(Testimony of Maurice Juster.)

(Thereupon trade-mark registration No. 389,114 was received in evidence and marked plaintiff's Exhibit No. 9.)

Mr. Mellin: I offer copy of trade-mark registration No. 438,495, "Fairyland," as plaintiff's Exhibit No. 10.

(Thereupon trade-mark registration No. 438,495 was received in evidence and marked plaintiff's Exhibit No. 10.)

Mr. Mellin: And trade-mark No. 403,261 as plaintiff's Exhibit No. 11.

Mr. Orr: What is the last one?

Mr. Mellin: "June Girl."

Mr. Orr: Just a moment. Mr. Mellin. I believe we discussed over the telephone the matter of stipulating that there be added to the record the registration of the word "Story." Would you like to offer that in evidence now? [20]

Mr. Mellin: Yes, sir; I will do that. I would like to offer that. it is registration No. 525,896. "Story"; I would like it to go in the record as 9-A, together with "Storybook."

The Court: So ordered.

(Thereupon trade-mark registration No. 525,896, "Story," was received in evidence and marked plaintiff's Exhibit No. 9-A.)

Mr. Mellin: At this time, your Honor. I would like to offer a certified copy of the proceedings in

Testimony of Maurice Juster.)

The Patent Office in connection with the registration of "Little Red Riding Hood" as plaintiff's Exhibit 12.

Mr. Orr: No objection.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 12 in evidence.

(Proceedings of Patent Office referred to were received in evidence and marked plaintiff's Exhibit No. 12.)

Mr. Mellin: I should also like to offer in evidence a certified copy of the file wrapper of the proceedings connected with the registration of "Little Bo-Peep" as plaintiff's Exhibit No. 13.

Mr. Orr: No objection.

The Court: It may be admitted next in order.

The Clerk: 13.

(Thereupon certified copy of file wrapper referred to above was received in evidence and marked plaintiff's Exhibit No. 13.) [11]

Mr. Mellin: And a certified copy of the file wrapper in connection with the "Storybook" registration as plaintiff's Exhibit 14.

Mr. Orr: No objection.

The Clerk: Plaintiff's Exhibit No. 14.

(Thereupon certified copy of file wrapper referred to above was received in evidence and marked plaintiff's Exhibit No. 14.)

(Testimony of Maurice Juster.)

(Thereupon trade-mark registration No. 389,114 was received in evidence and marked plaintiff's Exhibit No. 9.)

Mr. Mellin: I offer copy of trade-mark registration No. 438,495, "Fairylend," as plaintiff's Exhibit No. 10.

(Thereupon trade-mark registration No. 438,495 was received in evidence and marked plaintiff's Exhibit No. 10.)

Mr. Mellin: And trade-mark No. 403,261 as plaintiff's Exhibit No. 11.

Mr. Orr: What is the last one?

Mr. Mellin: "June Girl."

Mr. Orr: Just a moment, Mr. Mellin. I believe we discussed over the telephone the matter of stipulating that there be added to the record the registration of the word "Story." Would you like to offer that in evidence now? [20]

Mr. Mellin: Yes, sir; I will do that. I would like to offer that, it is registration No. 525,896, "Story"; I would like it to go in the record as 9-A, together with "Storybook."

The Court: So ordered.

(Thereupon trade-mark registration No. 525,896, "Story," was received in evidence and marked plaintiff's Exhibit No. 9-A.)

Mr. Mellin: At this time, your Honor, I would like to offer a certified copy of the proceedings in

(Testimony of Maurice Juster.)

the Patent Office in connection with the registration of "Little Red Riding Hood" as plaintiff's Exhibit 12.

Mr. Orr: No objection.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 12 in evidence.

(Proceedings of Patent Office referred to were received in evidence and marked plaintiff's Exhibit No. 12.)

Mr. Mellin: I should also like to offer in evidence a certified copy of the file wrapper of the proceedings connected with the registration of "Little Bo-Peep" as plaintiff's Exhibit No. 13.

Mr. Orr: No objection.

The Court: It may be admitted next in order.

The Clerk: 13.

(Thereupon certified copy of file wrapper referred to above was received in evidence and marked plaintiff's Exhibit No. 13.) [21]

Mr. Mellin: And a certified copy of the file wrapper in connection with the "Storybook" registration as plaintiff's Exhibit 14.

Mr. Orr: No objection.

The Clerk: Plaintiff's Exhibit No. 14.

(Thereupon certified copy of file wrapper referred to above was received in evidence and marked plaintiff's Exhibit No. 14.)

(Testimony of Maurice Juster.)

Direct Examination

By Mr. Mellin:

Q. Will you give us your full name, your age and residence, Mr. Juster?

A. Maurice Juster, age 42, 3472 Fresno Street, Santa Clara.

Q. What is your occupation, Mr. Juster?

A. Manager of a doll factory.

Q. And that is the——

A. Dollcraft Company.

Q. The plaintiff in this action? A. Yes.

Q. Are you an officer of that company?

A. Yes, I am.

Q. And what office do you hold?

A. Secretary-treasurer.

Q. Are you also a stockholder in Dollcraft?

A. Yes, I am.

Q. Do you, in your capacity, as secretary-treasurer, do you [22] know the outstanding shares of that corporation and by whom they are owned?

A. Yes, sir.

Q. Would you tell us, please, who are the shareholders and what number of shares they own?

A. My wife, my brother-in-law and myself; we each have ten shares.

Q. That is ten shares to Elise Juster, ten shares to yourself, and ten shares to Richard Mollison?

A. Richard Mollison, yes.

Q. Who are the other stockholders?

A. Mr. Hinz.

(Testimony of Maurice Juster.)

Q. How many shares does he own?

A. Thirty-two shares.

Q. And Mr. Kerr?

A. Twenty-eight shares.

Q. And that is all the outstanding stock and all the stockholders?

A. That is all.

Q. Who are the other officers?

A. Mr. Hinz is president.

Q. Is that the only other officer?

A. Just a few officers.

Q. Will you tell us, is that a corporation of California, Mr. Juster? [23]

A. Yes, it is.

Q. And when was it incorporated, approximately, if you know?

A. It was approximately April, 1948.

Q. And what is the present location of the Dollcraft Company?

A. It is in Santa Clara county in the Myers Ceramic Building.

Q. In Santa Clara?

A. In Santa Clara.

Q. That is California?

A. California.

Q. And did that corporation, to your knowledge, succeed a partnership?

A. Yes, it did.

Q. And who were the partners? What was the name of that partnership?

A. Well, my wife and I.

Q. What was the name of the partnership?

A. Dollcraft Company.

Q. And who were the partners?

A. My wife, my brother-in-law and myself.

(Testimony of Maurice Juster.)

Q. And what was the business of that partnership?

A. That was to dress, to package and sell dolls—miniature dolls.

Q. By the way, is Mrs. Juster in Court?

A. No, sir. [24]

Q. And that is because she has had a major operation and has just returned from the hospital; that is why she couldn't accept a subpoena, is that right?

A. That's right.

Q. What was your business, let us say prior to going in the Navy?

A. I was in the men's wear business for about 16 years.

Q. What was Mrs. Juster's occupation or avocation or profession?

A. She was a designer—dress designer.

Q. How did this doll business originate, if you would tell us briefly and when?

A. I was overseas when my wife wrote me a letter telling me that she was doing research on foreign costumes for miniature dolls. At that time I thought it was a good idea for her to be doing something, keeping herself occupied; it was in her line of endeavor; and when I came back, why, she had had all these sketches and names and so forth, and shortly after I got out, why, we went into business in a very small way.

The Court: Fix the time.

Q. (By Mr. Mellin): When was that, Mr. Juster?

(Testimony of Maurice Juster.)

A. Well, we started active production in, I believe, September of 1946.

Q. When did you get out of the navy?

A. The end of '45—December, '45.

Q. And where did you make these dolls that you made in [25] commercial production in '47?

A. In our apartment, 712 21st Avenue, San Francisco.

Q. And did you adopt a name for that business at that time?

A. It was the Dollcraft Company.

Q. At that time were you acquainted with Mr. Hinz or Mr. Kerr?

A. Never had met the gentlemen.

Q. What dolls did you commence commercializing in that partnership, Mr. Juster?

A. Well, the materials to start production on the foreign dolls just weren't available so shortly after the war, so my wife designed a group of dolls, numbers with very short dresses and mainly out of felt and we marketed those first twelve in September of '46.

Q. What sort of dolls were they? Did they represent or depict anything?

A. No, they were just small miniature dolls with little girls' names.

Q. How long did you continue to commercialize those?

A. Well, we sold that series all through '47, and also the foreign dolls, and we brought out on re-

(Testimony of Maurice Juster.)

quest of a big store back east the Hansel and Gretel doll.

Q. When was it that you brought out the Hansel and Gretel doll?

A. Oh, that was the latter part of '47. [26]

Q. What other series or types of dolls did you make? A. You mean after '47?

Q. Yes. Well, in '47, as I understand it, you made that little girls' names series?

A. That's right.

Q. And the foreign series and Hansel and Gretel? A. Hansel and Gretel.

Q. Any others? A. That is all in 1947.

Q. In '48 what dolls did you make during that year?

A. Then, we were moving a little faster, then, and we supplemented our line with a nun.

Q. What? A. A nun doll.

Q. Yes.

A. And elaborated on the Little Lady Series, and we added the "Who Am I" series—a series of little character dolls from, oh, fairyland tales.

Q. Who designed all of those dolls, if you know, Mr. Juster?

A. My wife designed every number that we have ever sold.

Q. And the "Who Am I" dolls, were they dolls as I understand it, that depicted characters in fairy tales, story books, nursery rhymes and Mother Goose? A. That is right.

(Testimony of Maurice Juster.)

Q. And can you tell us what characters those were? [27]

A. Let's see, offhand, there was "Red Riding Hood."

Q. Just a moment. "Red Riding Hood." I show you a doll and ask you if that is a doll that was made in 1948 and sold by you, and what doll that depicts?

A. This is our "Red Riding Hood" doll.

Q. Does it have any particular characteristics, either in dress, design or otherwise, that would illustrate Little Red Riding Hood, and if so, would you tell us which ones they are?

A. It has the red hood and the red cape.

Q. And is that commonly or not commonly associated in fairy tale illustrations with Little Red Riding Hood?

A. That is very true.

Q. And that doll was made by the partnership and sold by the partnership?

A. Yes, sir.

Q. Was that prior or subsequent to the time that you became acquainted with Mr. Hinz or Mr. Kerr?

A. That was prior.

Mr. Mellin: We offer that doll in evidence, your Honor, as plaintiff's Exhibit 15.

The Court: It will be admitted and marked.

The Clerk: Fifteen in evidence.

("Little Red Riding Hood" doll referred to above was received in evidence and marked Plaintiff's Exhibit No. 15.)

Q. (By Mr. Mellin): I show you another doll,

(Testimony of Maurice Juster.)

it is called [28] "Who Am I" and given a number, and ask you what that is, if you know?

A. That one is "Miss Muffett."

Q. And when did you produce that doll, if you can tell us?

A. That was in '48, beginning '48.

Q. Beginning '48. Was that before or after you met Mr. Kerr and Mr. Hinz?

A. Before we met them.

Q. How do you identify that as Miss Muffett?

A. Well, it is mainly the style of her dress and her little cap that she is wearing.

Q. In other words, are those or are they not the features, decorations or characteristics of the nursery rhyme or story books designating or illustrating Miss Muffett?

A. That is right; you generally get your ideas from illustrations from old books, or even current books, most of them.

Mr. Mellin: I will offer the doll just identified by the witness as "Little Miss Muffett" as plaintiff's exhibit next in order, 16.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 16 in evidence.

(Thereupon, "Little Miss Muffett" doll referred to above was received in evidence and marked Plaintiff's Exhibit No. 16.)

Q. (By Mr. Mellin): I show you another "Who Am I" doll and ask you if you can identify it? [29]

A. That is "Little Bo-Peep."

(Testimony of Maurice Juster.)

Q. And why do you say that? It is not so marked on the box.

A. Well, her panniers and her crook in her hand.

Q. What are panniers?

A. They are the fancy flounces on the sides of the dress, and the crook in her hand.

Q. That is the crook or staff?

A. That is right.

Q. When was that doll produced by the Dollcraft Company, a partnership, if you will state, please?

A. Beginning '48.

Q. Was that before or subsequent to the time that you became a corporation and became acquainted with Mr. Hinz and Mr. Kerr?

A. Before.

Mr. Mellin: I will offer "Little Bo-Peep" in evidence as Plaintiff's Exhibit 17.

The Court: Let it be admitted and marked.

(Thereupon, doll "Little Bo-Peep" referred to above was received in evidence and marked Plaintiff's Exhibit No. 17.)

The Court: We will take a recess.

(Recess.)

Q. (By Mr. Mellin): I show you another doll and ask you if you can identify it?

A. That one is "Mistress Mary." [30]

Q. And does it have any characteristics usually associated with Mistress Mary?

(Testimony of Maurice Juster.)

A. Yes, her little flowered print dress and an apple in her hand.

Q. And when was that doll produced?

A. The beginning of '48.

Q. Was that part of the "Who Am I" series?

A. Yes, it is.

Mr. Mellin: I offer that doll in evidence as Plaintiff's Exhibit 18.

The Court: Let it be admitted and marked.

(Thereupon, "Mistress Mary" doll referred to above was received in evidence and marked Plaintiff's Exhibit No. 18.)

Q. (By Mr. Mellin): I hand you a doll that says "Who Am I, No. 205" and ask you if you know the identity of that doll?

A. That is "Alice in Wonderland."

Q. Why do you say that? When you say that, does that doll have any characteristics, dress or otherwise, that would identify it with the story book character?

A. Well, they generally in the story of Alice in Wonderland, she is wearing this type of apron, and she is blond and she wears a bow in her hair.

Mr. Mellin: I offer that as Plaintiff's Exhibit 19.

The Court: So ordered.

(Thereupon, "Alice in Wonderland" doll referred to above [31] was received in evidence and marked Plaintiff's Exhibit No. 19.)

(Testimony of Maurice Juster.)

Q. (By Mr. Mellin): By the way, were those dolls sold in boxes such as I have showed the dolls to you in? A. Yes.

Q. And did any descriptive matter accompany each box or not? A. Yes, they did.

Q. I show you a blue brochure that is called "Miniature Dolls Made by the Dollcraft Company, San Francisco, Cal.," and ask you to identify it?

A. Yes.

Q. How was it used?

A. This was used in each box we shipped.

Q. That is with each of the dolls that we have just identified? A. That's right.

Q. And one was put in each box?

A. Yes.

Mr. Mellin: May I offer that in evidence, your Honor?

The Court: It will be admitted and marked.

(Thereupon, brochure referred to above was received in evidence and marked Plaintiff's Exhibit No. 20.)

Q. (By Mr. Mellin): Were these folders prepared and these dolls that we have just identified, these eight dolls, prepared and commercially produced prior to the incorporation? [32]

A. Yes, they were.

Q. I understand you identified certain of them as being produced during the year '47, and certain of them the early part of the year '48; that is correct or incorrect? A. That is right.

(Testimony of Maurice Juster.)

Q. And these folders, which are Plaintiff's Exhibit 20, when were they produced?

A. Beginning '48. The moment we got them from the printers they were put into the boxes.

Q. I notice on this Exhibit 20 is the notation, "Fairyland Series"? A. That is right.

Q. When was that adopted as a series name or as a group name for your dolls?

A. Beginning 1948.

Q. At the beginning—would you say January or February?

A. Yes. When I took it down to the printers I thought that would be a good name to apply to the series.

Q. It says on here:

"I am a little friend of yours,

"Fairyland is where I dwell;

"I have come to play a game with you,

"But the answer I won't tell!

"Who Am I?"

What was the purpose of that, if any? [33]

A. Well, it was to design these little dolls as closely as my wife could to represent the characters they were to represent.

Q. In other words, "Little Red Riding Hood" was designed to depict Little Red Riding Hood and the same is true of "Little Bo-Peep" and the rest?

A. That is right. There was the matter of a

(Testimony of Maurice Juster.)

guessing game for the child to guess the character they were to represent.

Q. Is that how the term "Who Am I" originated?

A. Yes; we couldn't think of anything else to put on there, and we thought that that would be the answer.

Q. Was "Fairylane Series"—they were all fairylane, story book or nursery rhyme characters, were they? A. They were.

Q. During that time did you put out other dolls?

A. Yes, we put out the "Little Lady Series" and the "Foreign Series" and the Nun doll.

Q. I show you "Who Am I" No. 206, and ask you if you can identify that for me?

A. That is "Little Miss Donnett"; she wore a big bonnet.

Q. And the big bonnet is one of the identifying characteristics of the doll? A. That is right.

Q. That doll that I have just handed you was produced by the partnership, was it? [34]

A. Yes.

Q. Prior to the time when the Dollcraft Company became a corporation? A. Yes.

Mr. Mellin: I ask that the dolls just produced be received in evidence as plaintiff's Exhibit No. 21.

The Court: Admitted next in order.

The Clerk: Plaintiff's 21 in evidence.

(Thereupon "Little Miss Donnett" doll was received in evidence and marked plaintiff's Exhibit No. 21.)

(Testimony of Maurice Juster.)

Q. (By Mr. Mellin): I show you a doll of the "Who Am I" series and ask you if you can identify it? It is No. 207.

A. That is "Hansel" from the story "Hansel and Gretel."

Q. And is this doll designed to depict certain characteristics or a particular character in the story book character of Hansel and Gretel?

A. Yes.

Mr. Mellin: I offer that one in evidence as the next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 22 in evidence.

(Thereupon "Hansel" doll was received in evidence and marked plaintiff's Exhibit No. 22.)

Q. (By Mr. Mellin): I show you another doll, "Who Am I," No. 208 on the box, and ask you if you can identify it? [35]

A. Yes, it is "Gretel."

Q. And is that dressed to illustrate a character in story book tales?

A. Yes, her costume and her long braids.

Q. With respect to the "Hansel and Gretel" dolls, do you have with you illustrations of the story book that illustrates these dolls that I have just produced in evidence, 22 and 23?

Pardon me, may I offer the "Gretel" doll just identified by the witness as plaintiff's exhibit next in order?

(Testimony of Maurice Juster.)

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 23 in evidence.

(Thereupon "Gretel" doll was received in evidence and marked plaintiff's Exhibit No. 23.)

Mr. Orr: I want to make a statement at this time: that possibly countless books illustrating these various characters can be found and there are no two illustrations that would be anywhere near alike, so I think it is completely irrelevant and immaterial to introduce books of that kind at this time.

Mr. Mellin: I would be perfectly willing to stipulate that the dolls that we have offered are reproductions or illustrations of the characters we refer to if counsel would like to have this type of stipulation.

Mr. Orr: We are not willing to stipulate. They are merely the crudest idea of a particular character that they sought to depict, and there is nothing quaint or nothing material about [36] the particular source of the book from which they derived their ideas. Any two persons would make a completely different design; no two would make this——

The Witness: May I interrupt?

Mr. Mellin: Just a minute; we will do the talking, Mr. Juster.

The Court: Indicate the purpose of the offer.

Mr. Mellin: The purpose is this, Your Honor: We maintain, and I think it is a fact, that these dolls all depict these characters having certain characteristics that appear in the children's books

(Testimony of Maurice Juster.)

and have for years, like Little Red Riding Hood, Hansel and Gretel, and so on and so forth, so the children could pick them out as fairy tale characters. We know it is a fact. I have to prove it unless counsel is willing to stipulate that that we find those characteristics in some illustrations of those characters.

Mr. Orr: On the other side we must recognize that these are fictional characters; they never were real persons; they are purely fictional, and every illustrator in a book of that kind would have his own individual ideas of what that character might look like, just as every artist would have a different idea of how he would dress that doll. There is nothing evidenciary to indicate what each artist in this book may have drawn his or her conception of Hansel and Gretel from or any of the other characters involved here. They each have [37] their individual ideas. There isn't a representation of an individual character that ever existed.

The Court: I will allow it subject to a motion to strike; overrule your objection.

Q. (By Mr. Mellin): I hand you a story book, "Hansel and Gretel," and ask you if you can identify it?

A. Yes, it is a book, "Hansel and Gretel."

Q. Where did it come from?

A. It was sent to us by Joseph Harne.

Q. When was that? A. In 1947.

Q. That is while it was a partnership?

A. Yes, approximately.

(Testimony of Maurice Juster.)

Q. And the two dolls which you have identified, "Hansel" and "Gretel," in all essentials depict the two characters in this book as illustrated in this book?

A. Yes.

Mr. Mellin: I will offer the book in evidence as plaintiff's exhibit next in order.

The Court: It may be admitted.

(Thereupon book entitled "Hansel and Gretel" was received in evidence and marked plaintiff's Exhibit No. 24.)

Q. (By Mr. Mellin): And will you tell us whether that is the general fashion of selecting the doll characters of the others that we have referred to in addition to "Hansel" and "Gretel," [38] that is, out of story book or nurse rhyme tales?

A. Yes; otherwise your conception might be so far from the general conception that you would be way off base.

Q. (By Mr. Mellin): I show you what is supposed to be a duplicate invoice of a sale to the May Company, and I notice on there a bill for "Fairyl-land Series." Are those the dolls which we have just been discussing?

A. Yes, they are.

Q. So they were sold as early as February, 1948.

Mr. Mellin: I will offer that invoice in evidence as next in order, Your Honor.

The Court: Let it be admitted.

The Clerk: Plaintiff's Exhibit 25 in evidence.

(Testimony of Maurice Juster.)

(Thereupon invoice referred to above was received in evidence and marked plaintiff's Exhibit No. 25.)

Q. (By Mr. Mellin): I hand you what appears to be an order blank, and it is identified in this proceeding as defendant's Exhibit "C" for identification by the notary, and I will ask you if you can identify it? A. Yes, I can.

Q. And what is it, please?

A. It is a mimeographed order blank and catalog sheet.

Q. Of the Dollcraft Company?

A. Of the Dollcraft Company.

Q. The co-partnership or the corporation? [39]

A. The co-partnership.

Q. Does it have a date?

A. February 26th, 1948.

Q. And that has on it, does it, the little fairy land jingle of "Who Am I"?

A. That's right.

Mr. Mellin: I will offer that into evidence as next in order.

The Court: Let it be admitted.

The Clerk: Plaintiff's Exhibit 26 in evidence.

(Thereupon mimeographed order blank referred to above was received in evidence and marked plaintiff's Exhibit No. 26.)

Q. (By Mr. Mellin): I show you a doll which is apparently not identified on the box other than "Globe Trotter" series, and ask you what it is?

(Testimony of Maurice Juster.)

A. It is a little Dutch doll—a little Dutch girl.

Q. What series is that?

A. That is from our foreign series.

Q. When was that made?

A. That was designed previous to '46, but it wasn't actively manufactured until '47.

Mr. Mellin: I will offer that in evidence as a typical—the foreign series each one represents a country and each country is an authentic representation. That is the little Dutch girl? [40]

A. That is the little Dutch girl.

Mr. Mellin: I will offer that as typical of the foreign series, next in order.

The Court: Let it be admitted and marked.

(Thereupon little Dutch girl doll referred to, above was received in evidence and marked plaintiff's Exhibit No. 27.)

Q. (By Mr. Mellin): During the time that the doll company was a co-partnership, did you manufacture a doll which was dressed as a bride?

A. Yes, we did.

Q. What did you call that doll?

A. We called it "June," after my wife's cousin.

Q. I show you a box with a doll in it dressed to represent a bride, and ask you if that is the doll?

A. Yes, that is the doll.

Q. And that is designed to depict a bride, is it?

A. A bride.

Mr. Mellin: I will offer that in evidence as plaintiff's next in order.

(Testimony of Maurice Juster.)

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 28 in evidence.

(Thereupon doll called "June" was received in evidence and marked plaintiff's Exhibit No. 28.)

Q. (By Mr. Mellin): Prior to the time that you became a corporation, that is Dollcraft Company became a corporation, did [41] Mr. Kerr or Mr. Hinz have any financial or other interests in the Dollcraft Company, a co-partnership? A. No.

Q. Were they actively associated with that company in any capacity as far as its manufacture and sale of dolls was concerned?

A. No, all they did was supply us with doll bodies.

Q. You bought doll bodies from them. How long have you done that?

A. From the time we dressed our first doll until we incorporated.

Q. And that was purely a relationship of buyer and seller? A. That is right.

Q. You bought the bodies from them and they sold them to you, is that correct?

A. That is right.

Q. During that time had you ever met Mr. Kerr or Mr. Hinz? A. No.

Q. When did you first meet them, if you know?

A. We came down to look at their plant; I forget just exactly when it was.

(Testimony of Maurice Juster.)

Q. It was——

A. Mr. Patterson wanted us to see the plant, and he drove us down one day and Mr. Kerr showed us through the kilns and the molds and everything else, just to see how a little doll was [42] manufactured, because up until that time we never knew the first thing about how they were made.

Q. And what part in this partnership business did Mrs. Elise Juster play?

A. She did all the designing, she broke the girls into dressing and making of the dresses and little jobs like billing and so on and so forth.

Q. What did you do?

A. Helped to buy the materials. What I did?

Q. Yes.

A. I helped buy the materials, trimmings, packed the orders, shipped the orders, did a little selling.

Q. Do you still manufacture the “Little Lady Series” that you have been speaking of—that is, the corporation?

A. The corporation has expanded the “Little Lady Series” in different styles. Some of the names from the “Little Lady Series” are now in the corporation line.

Q. I hand you what appears to be a little brochure with doll names on it issued by the Dollcraft Company at Santa Clara, and ask you if that is a list of the dolls that were manufactured and sold by the Dollcraft Company prior to November of 1949?

A. Yes.

(Testimony of Maurice Juster.)

Q. And how many dolls does that represent that they are selling? [43]

A. Oh, I think there was about fifty some odd numbers.

Q. How many of those are characters out of nursery rhyme story books, and so forth?

A. Twelve.

Q. We had eight that were previously made by the co-partnership; it includes four in addition?

A. Yes; we rounded it out to make a dozen.

Mr. Mellin: I offer the brochure just identified by the witness in evidence as next in order.

The Court: It may be marked.

(Thereupon brochure referred to above was received in evidence and marked plaintiff's Exhibit No. 29.)

Q. (By Mr. Mellin): What characters did you add, Mr. Juster, if you recall?

A. "Bessie Brooks" and "Rapunzel," "Sugar and Spice," "Goldilocks." I believe that was—we took out some and added others.

Q. Which ones did you take out and which ones did you add?

A. We took out "Hansel" for one; "Miss Donnett," and added others.

Q. What was the reason for that, if you know?

A. They didn't—well, for one, a little boy doll doesn't seem to sell too well, so we replaced it with a girl, and I think as the material gave out on

(Testimony of Maurice Juster.)

“Miss Donnett,” why, we replaced it with a different character, that is all. [44]

Q. Is there anything that dictates the particular material in the dresses of dolls from time to time?

A. Yes.

Q. What is that?

A. As one material runs out, you replace it with another; the same with trimmings.

Q. In other words, trimmings and dress materials that you buy for dolls are changed seasonally or yearly?

A. That’s right.

Q. Just like other materials for the women’s dresses that are on the market, and that dictates to some degree the materials used in making dolls’ as well as women’s dresses?

A. That’s right.

Q. At the present time you are making and putting out dolls which carry the names of the dolls which they depict, is that correct or incorrect—the characters which they depict?

A. Yes.

Q. You have “Red Riding Hood,” “Miss Muffett,” “Little Bo-Peep,” “Mistress Mary,” “Alice in Wonderland,” and what others?

A. As of now, there is—after that first five, there is “Polly Flanders,” “Rapunzel,” “Gretel,” “Curly Locks,” “Goldilocks,” “Sugar and Spice” and “Bessie Brooks.”

Q. I hand you a doll in a bottle and ask you if you can identify it?

A. Yes, that is “Red Riding Hood.” [45]

(Testimony of Maurice Juster.)

Q. And it has "Red Riding Hood" on it?

A. Yes, it has.

Q. When did you commence putting the actual names of the dolls, that is, the characters they represent, on the packages or bottles in which they are contained?

A. Approximately September, 1948.

Q. That was after the incorporation of Dollcraft Company into a corporation?

A. Yes.

Q. What if anything prompted that move, Mr. Juster?

A. Well, we received quite a few letters from our accounts requesting that the dolls be identified on the box to make it easier for the stock girls when the dolls were on the shelf, and they don't have to memorize that Number 201 was "Red Riding Hood," it would be right on the box.

Mr. Mellin: The doll just identified by the witness is offered in evidence as plaintiff's next in order. May the record show that it was plaintiff's Exhibit 1 for identification to the deposition herein?

The Court: No objection. So ordered.

The Clerk: Plaintiff's Exhibit 30 in evidence.

(Thereupon "Red Riding Hood" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 30.)

Q. (By Mr. Mellin): I hand you Exhibit 30 and Exhibit 15. One is "Little Red Riding Hood" as produced by the plaintiff [46] subsequent to the incorporation of the Dollcraft Company and the

(Testimony of Maurice Juster.)

other was the one that was produced by the partnership. What are the differences, if any, between those two dolls?

A. There is no difference at all in the costuming; it is one doll is a little smaller than the other.

Q. But their costuming is almost identical?

A. Yes.

Q. At least it is identical in substance?

A. That is right.

Q. When did you commence putting these dolls in bottles, Mr. Juster? A. About June of '49.

Q. June of '49? A. '49, yes.

Q. And that bears "Dolls With a Story by Dollcraft Company, Santa Clara, California," on the bottle? A. That's right.

Q. And in more or less larger letters on the rim of the cap "Dollcraft Co., Santa Clara," is that correct? A. Yes.

Q. Did you put all of the "Fairylend Series" of dolls in bottles? A. No.

Q. Which ones did you put in bottles and which ones didn't you? I show you Number 203, "Little Bo-Peep." Is that one of [47] the products of the corporation? A. Yes.

Mr. Mellin: May I offer that in evidence as plaintiff's Exhibit next in order?

The Court: Let it be admitted and marked.

Mr. Mellin: May the record show that it was plaintiff's exhibit No. 5 for identification in the depositions in this action?

(Testimony of Maurice Juster.)

(Thereupon "Little Bo-Peep" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 31.)

Q. (By Mr. Mellin): I notice these bottles of the "Little Red Riding Hood," Exhibit 30, and "Little Bo-Peep," Exhibit 31, also carry a number. How does that number correspond, if at all, with the number of the "Who Am I" series?

A. They are identical.

Q. In other words, 201 in the "Who Am I" series represented a Little Red Riding Hood and that number carried over into the new lot?

A. That is right.

Q. I show you a doll marked 202, "Little Miss Muffet, Dollcraft Company, Santa Clara, California," and ask you if that is one of the dolls manufactured by the plaintiff corporation?

A. Yes, it is.

Q. And the marking of the name of the character which it [48] represents, "Little Miss Muffett," was applied to that subsequent to the time when the plaintiff became a corporation?

A. Yes.

Mr. Mellin: I offer "Little Miss Muffett" in evidence, Your Honor, as next in order.

The Court: Admitted next in order.

The Clerk: Plaintiff's Exhibit 32 in evidence.

(Thereupon "Little Miss Muffett" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 32.)

(Testimony of Maurice Juster.)

Q. (By Mr. Mellin): I now hand you a doll which carries the name of "Mistress Mary, Dollcraft Company, Santa Clara, California," and ask you if you can identify it? A. Yes.

Q. And what is it, please?

A. "Mistress Mary."

Q. Is that a product of the plaintiff corporation? A. Yes, it is.

Q. That was the title of the character of the doll which it depicts, "Mistress Mary." Was that applied to the carton subsequent to the time when the plaintiff became a corporation?

A. That's right.

Q. And about what time was that?

A. September of '49—I mean '48.

Mr. Mellin: I offer that doll in evidence as plaintiff's [49] exhibit next in order.

The Court: Let it be admitted.

Mr. Mellin: And I call attention on the record to the fact that it is Exhibit 7 for identification to the depositions in this action.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 33 in evidence.

(Thereupon "Mistress Mary" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 33.)

Q. (By Mr. Mellin): I now show you a doll which bears the name of "Little Miss Donnett, Dollcraft Company, Santa Clara, California," and ask you if that is a product of the plaintiff corpora-

(Testimony of Maurice Juster.)

tion and was manufactured by the plaintiff corporation subsequent to its incorporation? A. Yes.

Q. And the name of the character which it depicts, Little Miss Donnett, was applied to the carton subsequent to the time of the incorporation?

A. Yes.

Mr. Mellin: I will offer the doll representing "Little Miss Donnett" as plaintiff's next in order.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 34 in evidence.

(Thereupon "Little Miss Donnett" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 34.) [50]

Q. (By Mr. Mellin): I now show you a doll which apparently depicts "Curly Locks, No. 209, Dollcraft Company, Santa Clara," and ask you if that is a product of the plaintiff?

A. Yes, it is.

Q. And the name "Curly Locks" was applied to the doll depicting that character Curly Locks subsequent to the incorporation of the plaintiff, was it, or not? A. Yes.

Q. It was? A. Yes.

Mr. Mellin: The Reporter can't hear you nod, Mr. Juster.

A. I'm sorry.

Mr. Mellin: I offer the doll just identified by the witness as plaintiff's next in order and call attention to the fact that it is plaintiff's Exhibit No. 9 for identification to the depositions.

(Testimony of Maurice Juster.)

The Court: It may be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 35 in evidence.

(Thereupon "Curly Locks" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 35.)

Q. (By Mr. Mellin): I hand you a doll in a carton which is characterized as "Goldilocks, Dollcraft Company, Santa Clara, California," and ask you if that is a product of the plaintiff?

A. Yes, it is.

Q. The name "Goldilocks" was applied to the carton by this [51] plaintiff after it became a corporation, is that correct? A. Yes.

Mr. Mellin: I offer that doll in evidence as plaintiff's next in order.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 36 in evidence.

(Thereupon "Goldilocks" doll was received in evidence and marked plaintiff's Exhibit No. 36.)

Q. (By Mr. Mellin): I hand you a doll in a bottle which bears the name of the doll as "Sugar and Spice, Everything Nice, No. 211, Dollcraft Company, Santa Clara," and ask you if that is a product of the plaintiff? A. Yes, it is.

Q. That was produced prior to November, 1949, was it—prior to November, 1949? A. Yes.

Q. And the caps bearing the names which the

(Testimony of Maurice Juster.)

dolls depict were applied subsequent to the time when the plaintiff became a corporation, is that correct? A. That is right.

Mr. Mellin: I will offer "Sugar and Spice," as plaintiff's exhibit next in order.

The Court: It may be admitted.

The Clerk: Plaintiff's 37 in evidence.

(Thereupon "Sugar and Spice" doll, referred to above, was [52] received in evidence and marked plaintiff's Exhibit No. 37.)

Mr. Mellin: And I call attention to the fact that it is plaintiff's Exhibit No. 3 for identification in the depositions.

Q. I notice that there is a little tab "Patents Pending" on this bottle. What does that represent? Is that for the carton or for the doll?

A. That is for the carton, the patent for the bottle.

Q. I hand you a doll which appears to be dressed as a bride and it says on the outside "June, 120, Dollcraft Company, Santa Clara, California," and ask you if that is a doll produced by this plaintiff?

A. Yes, it is.

Q. And that doll is supposed to depict a bride, is it? A. Yes.

Q. Does it differ in any essential detail from the doll which you call "June" and which was dressed and sold by the Dollcraft Company when it was a partnership? A. No.

Mr. Mellin: I will offer that as next in order.

(Testimony of Maurice Juster.)

The Court: It may be admitted and marked.

(Thereupon "June" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 38.)

Mr. Mellin: May I call attention to the record that the doll just identified was plaintiff's Exhibit 15 to the depositions. [53]

Q. I show you a box containing a doll which bears the name of the doll "Rapunzel."

A. "Rapunzel."

Q. "Dollcraft Company, Santa Clara, California, No. 207," and ask you if that is a doll produced by this plaintiff? A. Yes.

Q. And that was produced by the plaintiff after it became a corporation, is that so? A. Yes.

Q. But not before? A. No.

Mr. Mellin: I will offer that doll in evidence as plaintiff's next in order.

The Court: It may be admitted and marked.

The Clerk: 39 in evidence.

(Thereupon "Rapunzel" doll referred to above was received in evidence and marked Plaintiff's Exhibit No. 39.)

Q. (By Mr. Mellin): I show you a doll the carton of which bears the doll's name as Gretel, Dollcraft Company, Santa Clara, California," and ask you if that is a doll produced by this plaintiff?

A. Yes, it is.

Q. I notice it bears the name "Gretel" on it?

(Testimony of Maurice Juster.)

A. That is right.

Q. And is this doll substantially different than the "Gretel" [54] which was produced by the partnership except in the design of the dress?

A. No.

Mr. Mellin: I offer that in evidence as next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 40 in evidence.

(Thereupon "Gretel" doll referred to above was received in evidence and marked Plaintiff's Exhibit No. 40.)

Q. (By Mr. Mellin): I show you a doll which bears the name "Bessie Brooks, Dollcraft Company, Santa Clara," and ask if that is a product of the plaintiff? A. Yes, it is.

Q. Was that product produced before or after it became a corporation?

A. After it became a corporation.

Q. That would be after April of 1948, would it?

A. Yes.

Mr. Mellin: I offer it in evidence as the plaintiff's next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 41 in evidence.

(Thereupon "Bessie Brooks" doll referred to above was received in evidence and marked Plaintiff's Exhibit No. 41.)

Q. (By Mr. Mellin): I now show you a doll

(Testimony of Maurice Juster.)

which is given the name "Alice in Wonderland" and ask you if that is a product of [55] this plaintiff?

A. Yes, it is.

Q. And that doll was produced by the plaintiff some time subsequent to its incorporation?

A. Prior and subsequent.

Q. In other words, while a partnership you put out a doll that represented Alice in Wonderland, did you? A. Yes.

Mr. Mellin: I will offer the doll just identified by the witness as plaintiff's next in order.

The Court: It may be marked.

The Clerk: 42 in evidence.

(Thereupon "Alice in Wonderland" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 42.)

Q. (By Mr. Mellin): I notice that each of the cartons of these twelve dolls we have just offered in evidence, Mr. Juster, bore the notation "Fairylan Series" on it? A. That's right.

Q. Is that corresponding to the "Fairylan Series" of eight dolls put out by the partnership prior to the incorporation or not? A. Yes.

Q. So that the differences in the dolls other than their dress dictated by materials, the differences in the eight characters which were produced by the partnership and also by the corporation, [56] the difference was that in the "Who Am I" series you didn't directly apply the nursery rhyme or story book characters to them? A. That is right.

(Testimony of Maurice Juster.)

Q. But you subsequently did?

A. That is right.

Q. Were there any other essential differences between the eight dolls representing the eight characters which were produced by the partnership and by the corporation?

A. No, only a matter of difference in the materials as one ran out and was replaced, and a number dropped because it wasn't a good seller and replaced with one that did sell better.

Q. After the Dollcraft Company became a corporation did the duties of Mrs. Juster and yourself change from what they were in the partnership?

A. No, they didn't change basically at all; in fact we had more to do.

Q. Did Mr. Kerr or Mr. Hinz take an active part in the designing of the dolls or the production, that is dressing of the dolls or producing of the material?

A. For the doll dresses, no.

Q. What part did they play other than financially in the business after it became a corporation?

A. Policy meetings, might be one every four days or maybe one every week. [57]

Q. Could you tell us what in general was decided on the method of sales of the dolls?

A. The method of sales, what price, salesmen had to be fired or hired, should we take this salesman, or—things like that.

Q. Is Dollcraft Company the only customer that Kerr and Hinz——

A. No.

Q. To your knowledge?

(Testimony of Maurice Juster.)

A. To my knowledge they have other customers that buy bisque dolls.

Q. You get just the bare doll body from them, don't you? A. That is right.

Q. When I say "you" I mean the Dollcraft Company; and then you apply the dresses to them?

A. That is right.

Q. Over what area did the partnership Dollcraft Company sell this "Fairylane Series" of dolls?

A. Practically every state in the Union.

Q. So that the area did not change when it became a corporation? A. No.

Q. Was it common or uncommon before you began putting the names of the dolls right on the packages for customers to ask for dolls by their names rather than by their numbers?

A. Yes, quite a few letters came in asking for the dolls by [58] name rather than by number.

Q. When, if you know, did you actually commence applying the names of the dolls, of the characters they represent, on the packages of the dolls?

A. About September of '48.

Q. September of '48?

A. Aside from "Hansel" and "Gretel"; that was in 1947. That was one account, or two accounts, rather.

Q. That was a year ago last September, is that correct? A. Yes.

Mr. Mellin: I have my exhibits mixed here, your Honor. May I beg the Court's indulgence?

Q. I show you an invoice dated August 14, 1947,

(Testimony of Maurice Juster.)

and a letter attached to it. Was that received and transacted in the usual course of business?

A. Yes, it was.

Q. And that letter calls for a "Hansel and Gretel" doll, does it? A. Yes, it does.

Mr. Mellin: I will offer that invoice as exhibit next in order together with the letter.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 43.

The Court: It is now 12 o'clock. Let us take an adjournment. [59]

(Thereupon invoice dated August 14, 1947, and letter attached, were received in evidence and marked plaintiff's Exhibit No. 43.)

(Thereupon a recess was taken until two o'clock p.m. this date.) [59-A]

Monday, August 21, 1950, at 2 P.M.

MAURICE JUSTER

a witness called on behalf of the plaintiff, resumed the stand, and testified further as follows:

Direct Examination

(Continued)

By Mr. Mellin:

Q. I show you two orders, one is dated October 15, 1947, ordering "Hansel and Gretel" dolls. Was that received in the due course of business and on or about the date that it bears, by the Dollcraft Company? A. Yes.

(Testimony of Maurice Juster.)

Q. I show you a second dated August 2, 1946, ordering "Fairylend Series," "Red Riding Hood," "Bo-Peep," and ask you if that order was received by the Dollcraft Company in due course of business?

A. Yes.

Q. On or about the date it bears? A. Yes.

Mr. Mellin: I will offer the two orders in evidence as plaintiff's next in order.

The Court: They may be admitted and marked.

The Clerk: Plaintiff's Exhibit No. 44 in evidence.

(Thereupon two orders referred to above were received in evidence and marked Plaintiff's Exhibit No. 44.)

Q. (By Mr. Mellin): I hand you what appears to be an order [60] blank or price list, whatever it is, of Dollcraft Company, Santa Clara, California, and ask you if you can identify it?

A. Yes, I do.

Q. What is it, please?

A. It is a price list we put out in 1949.

Q. When in 1949, sir?

A. Depending on when we got that back from the printer; maybe January or February or March.

Q. 1949? A. Yes.

Q. Is that the price list of the dolls you were making at that time? A. Yes, it is.

Q. Is that the list of dolls you are making at this time or not?

A. No, some have been taken out and some have been added.

(Testimony of Maurice Juster.)

Mr. Mellin: I will offer that price list in evidence as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 45 in evidence.

(Thereupon price list referred to above was received in evidence and marked Plaintiff's Exhibit No. 45.)

Q. (By Mr. Mellin]: Is this business of dolls generally, small dolls, whether they are Fairyland dolls or not, is it seasonal or unseasonal? [61]

A. Yes, it is seasonal.

Q. Will you tell us just a little bit about that? When is the period when you sell the dolls, that is, when you have the greatest number of orders?

A. The greatest number of orders are just about this time, for Christmas delivery.

Q. In other words, in the late summer or early fall?

A. That's right.

Q. That is because the orders come in considerably ahead of the delivery dates?

A. They are more and heavier.

Q. I show you a page from the San Francisco Chronicle of October 23, 1949, and I call your particular attention to an ad by Macy's:

"Exclusive bisque story doll. They stand. They come in glass container. They are removable for play. \$1.95."

Do you recognize whose products those are?

A. Yes.

(Testimony of Maurice Juster.)

Q. And whose are they?

A. They are our dolls.

Mr. Mellin: I will offer that advertisement in evidence as plaintiff's next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 46. [62]

(Thereupon advertisement referred to above was received in evidence and marked Plaintiff's Exhibit No. 46.)

Q. (By Mr. Mellin): Had you previous to that time sold Macy's your "Fairyland Series" of dolls?

A. Not our "Fairyland Series." We had sold Macy's under the name of O'Connor-Moffatt.

Q. I mean O'Connor-Moffatt. How about just previous to this ad of October 23, 1949?

A. No, not just previous; we sold them previously.

Q. Will you tell us about it, please?

The Court: Macy is the successor of O'Connor and Moffatt.

Mr. Mellin: Yes, I understand.

A. Yes.

Q. You had sold O'Connor & Moffatt?

A. We had sold O'Connor & Moffatt.

Q. Those dolls that are depicted in that ad?

A. No.

Q. I want to know about those dolls. Did you sell them those?

A. No, that is the first.

Q. That is not the sale?

(Testimony of Maurice Juster.)

A. That was the first order we sold them was those dolls in the jars.

Q. When had you sold those, do you know?

A. Just about a week before the ad appeared I believe we made delivery. [63]

Q. In other words, the dolls that appear in the ad and had been sold some time previously to Macy's?

A. Oh yes, surely.

Q. But prior to that time you had sold O'Connor & Moffatt?

A. Not the dolls in the jars, no. Do you mean dolls?

Q. I am asking about the dolls depicted in the advertisement I just showed you—that is the first time that you sold them those, the first time you sold Macy's?

A. That is right.

Q. I show you what purports to be an order of Macy's, San Francisco, dated 10/21—that would be October 21st—together with certain other moving papers including your own order and a bill, and ask you if you can identify it?

A. That's right, all doll papers.

Q. Those dolls, do you recognize them?

A. Yes.

Q. Those papers are documents of the transaction with Macy's with regard to "Fairyland" dolls, dolls under glass?

A. That is right.

Q. And dolls depicting fairyland, nursery rhyme or story book characters?

A. That's right.

(Testimony of Maurice Juster.)

Q. Named in the advertisement that was referred to?
A. That is right.

Q. These are the papers selling the dolls referred to in that [64] advertisement?

A. That is right.

Mr. Orr: I would suggest that the witness do the testifying, counsel, instead of counsel.

Mr. Mellin: I didn't mean to be out of order.

The Court: He is doing that in the interests of time.

Mr. Mellin: I will offer that in evidence.

(The invoice and papers referred to were marked Plaintiff's Exhibit No. 47 in evidence.)

Q. (By Mr. Mellin): Immediately following October 23, 1949, which was the date of the advertisement, what occurred, if anything, with respect to these dolls that Macy's had and that you sold them?

A. Well, the first thing Macy's got in touch with us and told us that they had a letter from Nancy Ann Doll Company.

Q. I show you what purports to be a copy of a letter dated October 24th on the letterhead of the firm of Charles S. Evans, attorneys and counselors and directed to Macy's, Stockton and O'Farrell, San Francisco 8. Is that the letter you referred to?

A. Yes.

Q. And that is the one, is it, or is it not, that Macy's advised you that they had received from the attorneys for the Nancy Ann?

A. That is right. [65]

(Testimony of Maurice Juster.)

Mr. Mellin: May I offer that copy in evidence as the plaintiff's next in order?

The Clerk: 48 in evidence.

(Thereupon letter referred to above was received in evidence and marked Plaintiff's Exhibit No. 48.)

Q. (By Mr. Mellin): What, if anything did Macy's do about returning the dolls to you, if they did?

A. First they notified us that they were going to send them back, and as soon as it was convenient for them, they did so—all the unsold portion of the order.

Q. I hand you what is a claim for credit of Macy's, San Francisco, dated 12/2/49, and ask you what transaction does that relate to, do you know?

A. That is it; that is the part they sent back.

Q. That is for the dolls in the advertisement?

A. Yes.

Q. And I show you what appears to be a credit memo from you to Macy's and ask you to identify it?

A. That is right; that is what it is.

Q. That is giving them credit for the returned dolls?

A. Yes.

Q. Were you advised personally by Macy's or anyone connected with Macy's the reason for returning those dolls?

A. Pardon me?

Mr. Mellin: Would you read the question? [66]

(The Reporter read the question.)

(Testimony of Maurice Juster.)

A. Well, there was a question of receiving the letter, they didn't like that, and shortly after we got the dolls back.

Mr. Mellin: I offer the two documents of the claim for credit of Macy's of San Francisco in evidence, your Honor, as plaintiff's next in order.

The Court: What amount?

Mr. Mellin: \$294.00.

The Court: What was it originally?

Q. (By Mr. Mellin): What was the reason they were returned, he wanted to know.

The Witness: Pardon me; he wanted to know the original amount of the order.

The Court: Yes, I asked you the amount.

Mr. Mellin: I beg your pardon; I misunderstood.

Q. What was the original order?

A. Forty dozen at twelve dollars.

Q. How much would that be?

A. I don't remember the amount.

The Court: \$480.

The Witness: Forty dozen at twelve dollars a dozen.

The Court: Twelve times forty, \$480.

Mr. Mellin: And the credit amount is \$294.

The Court: Let it be admitted and marked.

The Witness: They returned a little over half the order. [67]

The Clerk: Plaintiff's Exhibit 49 in evidence.

(Document referred to was received in evidence and marked Plaintiff's Exhibit No. 49.)

(Testimony of Maurice Juster.)

Mr. Mellin: I offer the credit memorandum.

The Court: It may be admitted and marked.

The Clerk: 50 in evidence.

(Credit memorandum referred to was received in evidence and marked Plaintiff's Exhibit No. 50.)

Q. (By Mr. Mellin): To your knowledge has Dollcraft been able to sell Macy's since that time?

A. No.

Q. Have any other customers of Dollcraft to your knowledge been notified? A. Yes.

Q. Of infringement of alleged trade-marks by this defendant? A. Yes.

Q. I hand you a letter on the letterhead of Charles S. Evans, directed to the West Coast 5c and 25c Store, dated November 2, 1949, and ask you if that was received by you from the addressee?

A. Yes.

Q. And with that letter I hand you a letter of November 3, 1949, directed to the Dollcraft Company from the West Coast 5, 10 and 25c Stores. Was that received by you in due course of mail? [68]

A. Yes.

Q. On or about the date it bears? A. Yes.

Mr. Mellin: I will offer those two letters in evidence, your Honor, as the next in order.

The Court: They may be admitted and marked.

The Clerk: Plaintiff's 51 in evidence.

(Testimony of Maurice Juster.)

(The two letters referred to were thereupon marked Plaintiff's Exhibit No. 51 in evidence.)

Q. (By Mr. Mellin): I hand you a copy of a letter on the letterhead of Charles S. Evans, directed to the Cliff House Gift Shop, Point Lobos Avenue, San Francisco, and ask you if that was received by you from the Cliff House Gift Shop. A. Yes.

Q. I hand you a letter on the letterhead of the Cliff House Gift Shop dated November 16, 1949, and ask you if that was received by you in the due course of mail together with the letter from the attorneys for the Nancy Ann? A. Yes.

Q. And the letter of November 16th from the Gift House reads as follows—it is directed to Mr. J. Hursh, 291 Sutter Street. That is one of your accounts? A. Yes.

Q. And this was received by you from Mr. Hursh? A. That is right. [69]

Mr. Mellin: "In view of the pending lawsuit, involving Dollcraft, we are today returning 55 of the original order of six dozen, which we purchased on October 6.

"We are deducting this amount from the invoice and are enclosing herewith a check in the amount of \$17.00."

Q. Were those dolls subsequently received by you? A. Yes, they were.

Q. And did you give credit to the Cliff House Gift Shop for them? A. We did.

(Testimony of Maurice Juster.)

Mr. Mellin: I offer those two letters in evidence as the next in order.

The Court: They may be marked.

The Clerk: Plaintiff's Exhibit 52 in evidence.

(The two letters referred to were thereupon marked Plaintiff's Exhibit No. 52 in evidence.)

Q. (By Mr. Mellin): I hand you a letter directed to the Victor Market, 2324 Chestnut Street, San Francisco, Calif., directed by Charles S. Evans to them. Was that received by you from the addressee? A. Yes.

Q. I hand you what appears to be credit memorandums to Whitney's at the Beach, account Cliff House Gift Shop. Can you identify those?

A. Yes. [70]

Q. What are they, please?

A. Merchandise returned from them.

Q. And that is pursuant to the letters we have just been discussing? A. Yes.

Mr. Mellin: I will offer the letter directed to the Victor Market under date of November 2, 1949, as plaintiff's next in order.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 53 in evidence.

(The letter of 11/2/49 to the Victor Market was thereupon marked Plaintiff's Exhibit No. 53 in evidence.)

Mr. Mellin: I will offer the two credit memorandums just identified by the witness as one exhibit.

(Testimony of Maurice Juster.)

The Court: They may be admitted.

The Clerk: Plaintiff's Exhibit 54.

(Two credit memorandums referred to were thereupon marked Plaintiff's Exhibit No. 54 in evidence.)

Mr. Mellin: That is all, counsel.

Cross-Examination

By Mr. Orr:

Q. When did you first learn about Mrs. Juster's interest in the matter of dressing little dolls?

A. When I was on Guam.

The Court: When what?

A. When I was on Guam in 1945. [71]

Q. (By Mr. Orr): Do you know what progress she made in that art at that particular time?

A. No; all she did was write me a letter that she was going into research of costumes at that time.

Q. What nature of costumes did she have in mind at that time?

A. Foreign costumes.

Mr. Orr: Let me state for the record at this time that I observed that Mrs. Juster was not in court. Last Friday I had a subpoena issued to myself and took a process server down to Santa Clara to serve her Saturday morning. To my surprise I learned that she had just been rushed to the hospital for an emergency operation and would not be able to appear. So I instructed the server to withdraw the service of the summons. That was dropped at that time.

(Testimony of Maurice Juster.)

I have in mind that there may be some information that we will want in this case that she would be best qualified to give. I will direct my questions to Mr. Juster with the hope that his answers will suffice. If we find that some of the information is available only through Mrs. Juster, we will have to figure out some way of bringing that into the record. But for the present I would like to have my examination of Mr. Juster understood with the view that I am asking some of the questions that I would normally have asked Mrs. Juster.

Q. Do you know to what sources Mrs. Juster referred in regard to the costumes of dolls that she had in mind? [72]

A. She had some old costume books that she had; I think she got them at the State Library in Washington—not in Washington; in Sacramento.

Q. By costume books, what do you mean? Catalogues?

A. No, I mean costume books, reference books.

Q. Reference books?

A. That are not in print; collectors' items.

Q. Do you know what progress she had made in that research at the time of your return from service?

A. Yes; she had, oh, approximately 20 sketches, colored sketches that she had all finished. She knew just what she was going to do with them.

Q. And were all of those directed to the national costume type of dolls?

A. That is right.

(Testimony of Maurice Juster.)

Q. Had she made any of the dolls at that time on your return from the service?

A. No, she had not.

Q. How long after your return was it before she did make the first actual dolls—that is, dressed the first actual dolls?

A. Let's see; I think it was about May or June of '46.

Q. And do you recall what the first doll was that she dressed?

A. Yes. I am pretty sure the first two she dressed were the "Dutch Boy" and a "Dutch Girl," and of course the others followed; "Czechoslovakian Boy and Girl"; "Dutch Boy and Girl"; [73] I can't recall them all in order, but I think those were the first ones.

Q. When was it that dolls of that type, that is, foreign costumed dolls, were put into commercial production by your organization?

A. In 1947.

Q. When in 1947?

A. I can't recall now exactly.

Q. Were they the first dolls made by your company?

A. No, the first dolls we made were the "Little Lady Series."

Q. When did Mrs. Juster begin the designing of the "Little Lady Series"?

A. When she found out how tough it was to try to get materials to put into the foreign dolls, she made a complete switchover to the little short dresses of felt and available materials.

(Testimony of Maurice Juster.)

Q. Where did Mrs. Juster secure the little doll bodies that she used for dressing her first set of dolls?
A. From Mr. Patterson.

Q. Who is Mr. Patterson?

A. Mr. Patterson is an old friend of the family, and at that time he was selling undressed dolls for Kerr and Hinz of Santa Clara.

Q. You say an old friend of the family; that is jointly of you and Mrs. Juster? [74]
A. Yes.

Q. Or you and your family or Mrs. Juster and her family?

A. Of my side of the family. His brother-in-law used to go with my sister.

Q. How long ago was that?

A. Oh, as far back as '39, I think.

Q. How long have you been married, Mr. Juster?

A. Oh, about—it should be exact, shouldn't it? I think 12 years or 13 years.

Q. Have you any children?

A. I have three children.

Q. Boys or girls?

A. I have two girls and a boy.

Q. And how old are the girls?

A. The girl is 12—11—time flies; I think it is 11—11 and 2 for the girls, and the little boy is 6.

Q. During the war period do you know whether or not your daughters, or the older one at least, collected little dressed dolls?

A. The first time I saw a little doll was when I came back from overseas.

(Testimony of Maurice Juster.)

Q. And what did you find in the way of a doll collection at that time?

A. I know that a neighbor had given her a bride for her birthday; what else I don't know, not off-hand. [75]

Q. You were the party who gave a deposition in this proceeding a few months ago? A. Yes.

Q. Do you recall that at that time you stated that Mrs. Juster had acquired a cabinet which she antiqued, prepared for a collection of "Nancy Ann" dolls? A. That is right.

Q. And that collection did include a number of "Nancy Ann" dolls? A. That is right.

Q. Do you recall the names of any of those dolls?

A. No. I am sorry you didn't hear me shake my head.

Q. The first dolls that your wife dressed, were they delivered to her personally by Mr. Patterson?

A. Yes, he brought them right up to the apartment.

Q. And was there discussion at the time as to how the dolls should be dressed? A. No, sir.

Q. Had the subject previously been discussed with Mr. Patterson? A. Not that I know of.

Q. In the course of the deposition that we took some time ago, didn't you indicate that Mr. Patterson had expressed admiration for some of the designs that she had devised and disclosed to him? [76]

A. All Mr. Patterson had seen previous to bringing her the dolls was the foreign doll sketches.

Q. How long before the time he brought the doll

(Testimony of Maurice Juster.)

bodies was it that he was shown the foreign doll sketches?

A. Oh, a matter of two or three months.

Q. Had you or Mrs. Juster conferred with him at any time between the first disclosure and the time he brought the dolls? A. No.

Q. Had you had any discussion or correspondence with him about them?

A. No. You know, after all, Mr. Orr, he only brought a dozen dolls.

Q. Did you ask him to bring them? A. No.

Q. Or did he bring them voluntarily? Whose idea was it that he bring them?

A. It wasn't my idea.

Q. Was it Mrs. Juster's?

A. It might have been, yes.

Q. Was it Mr. Patterson's?

A. It might have been; I don't know; I can't answer.

Q. You say there were just a dozen of those particular dolls?

A. That is about all, just a dozen.

Q. How were those dolls dressed? [77]

A. They weren't dressed, they were undressed.

Q. When Mrs. Juster designed costumes and applied them to the dolls, what kind of costumes were they?

A. Well, I think, as I say, a few of them were dressed in the foreign costumes, and a few of them were dressed in the short dresses. You can't do much with only a dozen dolls.

(Testimony of Maurice Juster.)

Q. Could you give us a little more definite——

A. You mean description?

Q. A little more definitely your recollection of how many foreign dolls were made and what were they.

A. Well, I told you, Mr. Orr, that the closest I can remember, there was about three pair of the foreign dolls, that makes six; so there probably was six of other kinds.

Q. After your wife's dressing of this first group of twelve dolls, how long was it before you really got into commercial production?

A. Well, we didn't go into production until after I got a couple of orders. I sold the City of Paris—City of Paris and the White House, and we went immediately into production. I didn't dare go out selling any more.

Q. Who secured those orders?

A. I did.

Q. Did Mr. Patterson ever do any selling for you?

A. Yes, he took——

Q. When did he begin? [78]

A. Pardon me?

Q. When did he begin his activities selling for you?

A. Well, he procured that order from Joseph Horne for us, and that was in 1947, the latter part of 1947.

Q. Is that one of the orders that has been identified in this proceeding?

A. Yes, the "Hansel and Gretel" order.

(Testimony of Maurice Juster.)

Q. You say that Mr. Patterson was the one who secured that order for you? . A. Yes.

Q. Was that the first order that he secured for you?

A. I don't know; I can't remember. I am pretty sure it was, because I don't think he actively started selling for us until '48.

Q. You say you yourself procured an order from the White House?

A. That was the first two orders we ever received.

Q. The White House and the City of Paris and those you sold yourself? A. Yes.

Q. Do you recall how many dolls were involved in those orders?

A. About a gross to one and about a gross and a half to the other one.

Q. How long did it take you to fill those orders?

A. I don't know; not too long. We made the delivery dates, and it was before Christmas. [79]

Q. Do you recall the date of the order?

A. Let's see. I guess it was October, '46.

Q. What was Mr. Patterson's occupation when you first discussed this doll problem with him?

A. What doll problem?

Q. The matter of manufacturing the dolls that your wife had designed.

A. He was a salesman for Keystone Bros., leather goods.

Q. Did he represent any other organization in a

(Testimony of Maurice Juster.)

selling capacity? I believe you said he was selling for Hinz and Kerr, did you not?

A. Oh, yes, he sold their undressed dolls and the Keyston line. How many others he has—he had then, I don't know.

Q. What was the Keyston line?

A. It is cowboy suits and Indian suits, satchels and leather goods.

Q. Did you know whether or not he had at any time sold "Nancy Ann" dolls? A. Oh, yes.

Q. Did he ever discuss that experience with you?

A. No.

Q. Did he ever tell you anything about it?

A. Not until after he was working for us.

Q. What did he say with respect to the kind of dolls that seemed most popular? [80]

A. He said a nun doll was very popular, so we made a nun doll.

Q. Did he specify any other kind that were regarded as preferable? A. Bride.

Q. Any others?

A. He thought the short skirts would sell very well. He was wrong there.

Q. How long did you continue to turn out the line of short skirt dolls that you began with?

A. All of '47, and we kept some of the short dresses and had long dresses in 1948.

Q. Where did you secure the doll bodies which your organization dressed and sold?

A. From Kerr & Hinz Doll Company.

(Testimony of Maurice Juster.)

Q. And they were sold to you by Mr. Patterson?
A. That is right.

Q. Whose suggestion was it that you meet Mr. Hinz and Mr. Kerr in regard to the further capitalizing of your doll company?

A. Well, it was Mr. Patterson who wanted to put some money in, but I didn't like his proposition.

Q. Will you tell us just briefly the circumstances that led up to your introduction to Mr. Hinz and Mr. Kerr?

A. Well, I can't recall the exact date I met Mr. Hinz and Mr. [81] Kerr. I know it was a matter of taking—just taking a ride down the Peninsula with Mr. Patterson to look through the doll factory to find out how the dolls were made. We found it very enlightening, but that's all.

Q. Prior to your trip down to the Hinz and Kerr plant, had there been any discussion of your forming a partnership with Mr. Patterson?
A. No.

Q. Is it not the fact that Mr. Patterson had proposed to you that he finance you in your further activities?

A. That's right, he wanted to and I said after—after I heard him out I said no.

Q. In other words——

A. Then he had a counter proposal.

Q. In other words, there was a discussion of the possibility there and you declined the proposal that he made?

A. No. At first he had a proposal on his own; he wanted to be—he wanted to supply the capital for

(Testimony of Maurice Juster.)

a full fifty per cent interest and I turned him down. Then he suggested—told me that we couldn't go on the way we were undercapitalized and he would like to take me down again at least to see Mr. Kerr and Hinz to see if some agreement could not be made about getting together.

Q. This is early in 1948, was it not?

A. Yes. [82]

Q. Along about the time of the Toy Fair or shortly after?

A. Very shortly after; the week following.

Q. Was there a question of the ability of your organization to fill orders that brought the question up at that time?

A. That is right. I told him he had booked so much business for us that we needed capital to fill them, to expand.

Q. And at that time what was the state of your account with Hinz and Kerr?

A. Current, or almost so.

Q. In your subsequent arrangement with Mr. Hinz and Mr. Kerr, wasn't there a matter of a delinquency in your account that was taken into account?

A. Yes; to fill all those orders that Mr. Patterson wrote, why, I had to go in the hole to Kerr and Hinz.

Q. Were there further financial obligations facing you that rather——

A. No, everything else was current. The only money I owed was Kerr and Hinz.

Q. You say that Mr. Patterson proposed an ar-

(Testimony of Maurice Juster.)

Q. And they were sold to you by Mr. Patterson?
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A. No, everything else was current. The only money I owed was Kerr and Hinz.

Q. You say that Mr. Patterson proposed an ar-

(Testimony of Maurice Juster.)

arrangement by which he would share fifty-fifty with you? A. That's right.

Q. What arrangement did you make with Mr. Kerr and Mr. Hinz?

A. Well, it was essentially the same; only it was differently put. At least I had some say in the matter with Mr. Kerr and Mr. Hinz, whereas with Patterson I didn't have anything to say. [83]

Q. I believe in your partnership arrangement there were three partners, yourself, Mrs. Juster and Mr. Mollison. A. That's right.

Q. And you shared equally a third each in the partnership? A. That is right.

Q. What was the arrangement that was made with Mr. Hinz and Mr. Kerr? What shares did you and your wife and Mr. Mollison retain in the business?

A. The original agreement was ten shares each for Mr. Mollison, Elise and I, and fifteen shares for Mr. Kerr and fifteen shares for Mr. Hinz. That was the original.

Q. Was that modified before it was put into effect?

A. What do you mean, before it was put in effect?

Q. Do you say that was the original——

A. Since there has been changes made, yes, Mr. Hinz and Mr. Kerr have put in additional capital.

Q. What are the present relative holdings of Mr. Hinz, Mr. Kerr and yourself and Mr. Mollison and Mrs. Juster?

(Testimony of Maurice Juster.)

A. Mr. Mollison, Elise and myself still have ten shares each. Mr. Kerr has 28, and Mr. Hinz has 32.

Q. I will direct your attention to the deposition which was taken on Friday, July 20, 1950, in the present proceeding, and referring especially to page 21 beginning line 20, will you take a look at it (handing deposition to witness)?

A. Line 20? [84]

The Court: For the purpose of reading that, he is going to examine you on it. You may read it.

A. I remember this.

Mr. Orr: At the point indicated in the record, the report says:

“Q. With reference to a meeting between yourself and Mr. Kerr, what were the circumstances that led to that meeting?”

And in answer to that you said:

“Well, Mr. Patterson was beginning to sell a lot of our dolls; in fact, he sold a lot at the 1948 Toy Fair, and he was calling me up from New York and was asking me if I could step up production. He was calling every other day from New York, telling us how the dolls were selling and asking whether I could make deliveries, and I told him that we were pressed for money and that I didn't know; we were doing the best job that we possibly could under the circumstances, working out of an apartment. So I told him I had been to a couple of banks to try and get a loan, but the banks had turned

(Testimony of Maurice Juser.)

arrangement by which he would share fifty-fifty with you? A. That's right.

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A. Since there has been changes made, Mr. Hinz and Mr. Kerr have put in additional shares.

Q. What are the present relations between Mr. Hinz, Mr. Kerr and yourself and Mrs. Juster?

(Testimony of Maurice Foster.)

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And in answer to that you said:

"Well, Mr. Patterson was beginning to sell a lot of our dolls; in fact, he sold a lot at the 1948 Toy Fair, and he was calling me up from New York and was asking if I could step up production. He was coming every other day from New York to see how the dolls were selling, so I could make more. He decided to hire me as a designer."

I pressed my face against the glass and looked down at the dolls. They were doing well under the

(Testimony of Maurice Juster.)

me down and said they couldn't possibly do it, and he said, "Hold everything until the Fair is over," and he flew out here immediately upon the Fair closing, and I went down to his apartment and he laid out a proposition before me. In fact, he had hinted over the phone that he would like—he [85] asked me over the phone how I would like him as a partner, and I said fine, because I knew he was in a position to help us a great deal financially as well as a representative. When he got back here I went down to the apartment. I didn't like his proposition at all; he wanted too much. He said that we were only going to exhaust ourselves trying to pull ourselves up by our bootstraps; that we absolutely had to have help if we wanted to continue to exist. He said he had another proposition. He wanted me to meet Mr. Kerr and Mr. Hinz, and a day or so following, why, he brought us down to Santa Clara and we started talking back and forth. Of course, we owed Kerr and Hinz some money, and we started talking back and forth and we made an arrangement to form a corporation."

Do you recall giving that testimony?

A. Yes, sir.

Q. And that testimony is substantially in accord with the facts as you recall them? A. Yes.

Q. In your statement there that you knew that Mr. Patterson could be of substantial help to you,

(Testimony of Maurice Juster.)

what induced that thought in your mind? Did you know whether he was financially able to help you?

A. Yes, I knew that, and I also knew that he was a very successful sales representative. [86]

Q. Were you aware that he had been quite successful in selling the "Nancy Ann" dolls?

A. I was aware of that.

The Court: Selling what?

Mr. Orr: "Nancy Ann" dolls.

Q. Do you recall how long he represented the "Nancy Ann" Company in selling dolls?

A. No, I still don't know how long he worked for the "Nancy Ann" Doll Company.

Q. Following the arrangement that you made with Mr. Hinz and Mr. Kerr, what, if any, participation did Mr. Patterson have in the business?

A. In our business or their business?

Q. Both or either.

A. As far as I know, all he had was he was their sales representative and he was the sales representative for us, too.

Q. In fact, he had been selling the dolls for you before the arrangement was made?

A. Oh, no. He sold dolls for Kerr and Hinz first before he ever started selling dolls for us.

Q. But he had been selling for you as a partnership before the corporation was formed?

A. That's right.

Q. And then following the formation of the corporation, he still continued as a salesman for the organization? [87]

(Testimony of Maurice Juster.)

A. That's right, up until the end of '49.

Q. Now, in determining the policy of the partnership, did you take an active part?

A. In the partnership?

Q. In the partnership. A. Oh, yes.

Q. How did you determine the policy as between yourself and Mrs. Juster and Mr. Mollison?

A. Mr. Mollison had nothing to do in the business at all. He trusted his sister and myself to do the best job we could.

Q. Then it was largely a matter of agreement between yourself and Mrs. Juster as to what was to be done?

A. That's right. If came in and I didn't like the way one girl was dressing a doll, I didn't tell the girl; she told the girl.

Q. With reference to the sales of your product, who determined which dolls were to be continued in the line and which ones were to be dropped?

A. That is a very simple matter. Whenever you have a dud, you drop it. That is in every business. Mr. Orr, when a thing doesn't sell, you just let it go.

Q. In determining between yourselves which were the duds and which were the ones that might make good——

A. Your sales told you that. If you didn't sell, you just didn't make it any more, that's all. [88]

Q. Did you ever discuss the sales of any of your doll products with Mr. Patterson?

(Testimony of Maurice Juster.)

A. Why, sure.

Q. And did he ever have any suggestions to make as to which dolls should be continued and which ones should be dropped?

A. Yes, he would tell me that certain things weren't selling, and don't make them any more for our own good. Naturally I followed his expert advice.

Q. And at times did he also suggest certain types of dolls that he thought would sell readily?

A. Yes, he said a nun would be a good number to add to our line.

Q. And other dolls as well, at his suggestion?

A. What do you mean, "other dolls"?

Q. Others than the nun; that isn't the only one he suggested?

A. Of course that is the missus' job, is to create new numbers.

Q. At his suggestion, you did add additional numbers to your line?

A. We added the nun and the bride to our line on his suggestion.

Q. Are those the only two?

A. I don't know how many others.

Q. There were others?

A. There may not have been. [89]

Q. There may have been many?

A. No, I won't say many, I don't think.

Q. Several, I will say.

A. He didn't tell us how many numbers to put in the line and he didn't tell us how many not to

(Testimony of Maurice Juster.)

carry. I am only trying to help you.

Q. I am only asking what his participation was. Did he make any suggestions along that line?

A. Not too many.

Q. But he did make some?

A. He made a few.

Q. And some you accepted?

A. Some we accepted. Those we felt we should accept we accepted.

Q. After your organization became incorporated, who determined the policy of the company?

A. On policy matters there was a meeting.

Q. And who would attend that meeting?

A. Mr. Kerr, Mr. Hinz, Elise and myself.

Q. At any time did your sales representatives attend those meetings?

A. There was once that Mr. Patterson and Mr. Kahn were present at such a policy meeting.

Q. Did Mr. Patterson and your other salesmen keep in touch with you with regard to the trends of the market and the types [90] of dolls that would be demanded? A. Yes.

Q. And would you have that information available at the time you had your directors' policy-forming meetings? A. Yes.

Q. And in determining policy, were the recommendations of your salesmen taken into account?

A. They were considered.

Q. Did Mr. Patterson have any financial interest other than as a sales representative in the Dollcraft Co.? A. None.

(Testimony of Maurice Juster.)

Q. Either before or after the incorporation?

A. Before or after.

Q. Has he any connection with it at the present time? A. No.

Q. How long since he has represented the company in a sales capacity?

A. Since the end of 1948.

Q. Now, as I recall your testimony, you started out with a group of dolls which were given the names of little girls? A. Yes.

Q. And that line of dolls was continued for a substantial length of time?

A. It was continued until the end of '46, all of '47 and part of '48—part of the numbers were '48, all of '48. [91]

Q. And are some of them still in the line?

A. No, some of them—the balance of the short dresses were discontinued as of the beginning of this year. We ran some of them through up until the beginning of this year. We felt they had had their run.

Q. They were available most of '49?

A. Yes.

Q. The next group you added, as I recall, was the group of foreign costume dolls? A. Yes.

Q. And they were twelve in number, twelve different styles?

A. Well, there was twelve countries.

Q. Twelve styles in that group?

A. That is 24 styles, twelve boys and twelve girls.

(Testimony of Maurice Juster.)

Q. You had pairs? A. Yes.

Q. Then how long was it after you had put out your line of foreign costumed dolls that you began the series of "Who Am I?" dolls?

A. We brought out the "Who Am I Series" in the beginning of 1948.

Q. At that time, in the beginning of 1948, I believe you stated that they were boxed and put out in the manner exemplified by the several exhibits offered here this morning? A. Yes. [92]

The Court: We will take a recess until counsel finds his doll.

(Recess.)

Mr. Orr: I will direct your attention to an exhibit, Plaintiff's Exhibit 18, which is identified as "Who Am I? No. 204" and ask, does that represent the form in which you put out the "Who Am I Series" of dolls? A. Yes.

Q. Did you put out those dolls in more than one size? A. In 1948, no.

Q. When you first began putting them out in '47, I believe you stated——

A. 1946. They were all one size, seven inch bisque dolls.

Q. When was it you said you began putting out the "Who Am I Series"?

A. You are talking about the size of the doll?

Q. No, the series, "Who Am I?"

A. The series in 1948.

Q. That was in 1948? A. Yes.

(Testimony of Maurice Juster.)

Q. Could you fix about the month?

A. Yes, about February—January or February.

Q. As you first put them out at that time, and in the early part of 1948, you did not apply to the doll or to the box the mark to identify the character that is supposed to be depicted [93] by the contents of the box? A. No.

Q. It appeared neither on the box nor on the doll? A. No.

Q. Is that true with respect to the whole line of "Who Am I?" dolls?

A. That was true of all the "Who Am I?" dolls.

Q. These little blue circulars that are identified here as Plaintiff's Exhibit 20 were inserted as inserts in the boxes of dolls sold at that time, were they not? A. Yes, they were.

Q. In the little blue circulars of the dolls we are referring to, were those listed under "Fairyl-land Series"? A. Yes.

Q. And in the listing there was no designation of name following the numbers 201, 202 up to 208?

A. That is right.

Q. And referring now to the invoice and price sheet, Plaintiff's Exhibit 26, directed to DeMet's, Inc., of Chicago, does that indicate the listing which you made on your price lists and order sheets at that time? A. That is right.

Q. That was during the early part of '48?

A. That is right.

Q. And no name was included in any of the items of the "Who [94] Am I Series"?

(Testimony of Maurice Juster.)

A. That is right.

Q. Whose idea was it to add the "Who Am I Series" to your line of dolls? A. Elise's.

Q. And have you any information as to where the idea sprung from, where she struck upon that?

A. Probably reading fairy tales to Bonnie. Bonnie is my daughter, the oldest one.

Q. Do you know whether the matter might have been suggested by Mr. Patterson?

A. I don't know. We very seldom saw Mr. Patterson; he was on the road.

Q. As far as you know, it could have been suggested by Mr. Patterson?

A. Let me finish, Mr. Orr. You understand that he was only a sales representative of ours and that we saw him very seldom. He was on the road at least eight or nine months of the year, and then during the summer he would take a two months' vacation, and during the Christmas holidays he would take another vacation, so we didn't see him very often.

Q. He did keep in touch with your organization, however, didn't he?

A. Oh, yes, many a time. If it was only over the phone to find out how we were getting along. In fact, he never saw the [95] 1948 line until it was all designed. I think the nun suggestion that he gave me came over the phone. He says, "I think you ought to have a nun."

Q. The "Who Am I Series" was first introduced in 1948, was it not? A. Yes.

(Testimony of Maurice Juster.)

Q. And can you state positively that it was not Mr. Patterson's suggestion that you add the "Who Am I Series"?

A. No, I won't be pinned down like that.

Q. You couldn't say that he didn't make the suggestion?

A. No, I won't say that he didn't; I won't say that he did—he did or he didn't.

Q. Mr. Patterson was representing you as a sales representative at the time you first put the "Who Am I Series" out, was he not?

A. Yes.

Q. How long was it after you first displayed these dolls without the names, the dolls of the series "Who Am I?," was it before you began to apply the name to the containers?

A. I believe it was September of '48; it could possibly be a little later.

Q. That would be after the corporation was formed? A. Yes, sir.

Q. Whose suggestion was it that the names be applied to the boxes? [96]

A. The suggestion first came from our customers, and the salesmen, Mr. Kahn in particular was hounding me for months to do it.

Q. Which salesman was that?

A. Mr. Kahn—Mr. Larry Kahn.

Q. Did Mr. Patterson also make the suggestion?

A. No; that I know definitely.

Q. You say the suggestion came from your customers. Why was that?

(Testimony of Maurice Juster.)

A. Well, they wanted the dolls identified by name along with the number.

Q. Was that because of difficulty encountered in identifying the dolls with the characters that they are supposed to depict?

A. No, no, it was encountered in difficulty when they were stacked on the shelves, so it would be very easy, instead of trying to remember eight characters by the numbers, if the salesgirl just saw the name there, she could pick it right out of the shelf amongst the stack of boxes.

Q. How about when the customers came into the stores?

A. I think we sold enough——

Q. Was it to facilitate their selection of dolls?

A. I think we sold enough of those without any identification to prove that they recognized the characters that they were supposed to depict. The mere fact that we got lots of reorders on them I think proved that they recognized the [97] characters, Mr. Orr.

Q. Now, I believe that you testified this morning that with respect to doll item No. 203, "Who Am I?," which is Exhibit 17, that you identified her as "Little Bo-Peep," largely because of the shepherd's crook that she carries; is that right?

A. No, I said the panniers and the crook.

Q. And with respect to the doll No. 204, which has been identified here, I believe, as "Mistress Mary."

A. That's right.

(Testimony of Maurice Juster.)

Q. The identifying characteristic there is the flower in the hand?

A. The flower in the hand and also we carried the flower into her dress.

Q. Now, the flower dress, would that suggest then that perhaps this young lady is also "Mistress Mary"?

A. No. Her pattern is more of a checked pattern.

Q. Those little figures you do not call flowers?

A. That is a figure that you would recognize as a bowl, Mr. Orr, not a flower.

Q. Is "Mistress Mary" the only one in which you used a pattern design?

A. Oh, no; you are limited to what you can buy.

Q. That reminds me: What was the material shortage that you encountered in the early days when you first got back from the service? What material did you find especially short? [98]

A. Well, taffetas and satins were on the black market. One man particularly told me that "This isn't worth it, but that is what you are going to have to pay if you want it." That was in 1947. And also the wholesale houses, a lot of wholesale houses, jobbers in San Francisco, did not have print material. You could buy it retail cheaper than you could buy it wholesale, and a lot of materials were bought that way.

Q. Among the materials which were included in the costuming of this doll, Plaintiff's Exhibit 27, which is one of the foreign dolls, which of the materials were there on the shortage list that you

(Testimony of Maurice Juster.)

complained of? A. The cotton gabardine.

Q. Along with silks and satins?

A. And you know how I got that?

Q. When did you get it, is more important.

A. I got in '47, and I got it through a manufacturer that was a friend of mine.

Q. Referring now to Plaintiff's Exhibit 45, which is a price list order blank for Dollcraft Co., will you state when that was put into use?

A. I think we had those printed just in time for the Toy Fair of 1949, I am pretty sure.

Q. At that time were you putting out any of your dolls in the glass containers?

A. No. [99]

Q. When you adopted the various means which have been included in the list of "Fairyland Series" dolls, Nos. 201 to 212, as shown by Exhibit No. 45, did you make any investigation as to whether the marks had been in use by others or use on doll products? A. I believe Mr. Hinz did.

Q. What investigation was made?

A. What?

Q. What investigation was made?

A. Oh, I don't know the workings of that.

Q. Before you made your arrangement with Mr. Hinz and Mr. Kerr and while you were operating as a partnership, you used a number of these names. Did you make any investigation before you began using them?

A. No, in partnership we made no investigation.

(Testimony of Maurice Juster.)

Q. At the time you began making the "Who Am I Series" which was put out without names, did you know that there were other manufacturers or another manufacturer that was marketing a "Red Riding Hood" doll? A. Yes.

Q. Did you know who that was? A. Yes.

Q. And who was it?

A. That Unique—not Unique; somebody back East made a very cute little doll dressed as Red Riding Hood, about a six-inch doll that sold for about \$3.95. [100]

Q. Did you know that the mark "Red Riding Hood" was registered as a trade-mark?

A. When I first saw that "Red Riding Hood" doll, I didn't know it, no, because that was in '47.

Q. When you began using the name "Little Miss Muffett," did you know that there was a registration for a trade-mark on that name?

A. We didn't use Miss Muffett in '47 or '48; we used "Who Am I?" We didn't use any names until after the incorporation, Mr. Orr.

Q. I see. You didn't apply any names until after the corporation was formed?

A. No; the only two we used as a partnership was "Hansel and Gretel," and that was that order that Mr. Patterson sold to Joseph Horn & Company, and I had a few left over that I gave to a little customer out on Balboa Street, and those were the only two in 1947 that had "Hansel and Gretel."

Q. You yourself did not participate in the making of any investigation with regard to the names

(Testimony of Maurice Juster.)

when you did decide to apply them to the dolls. is that correct? A. No, I didn't.

Q. I believe you said Mr. Hinz made it?

A. Yes.

Q. What part does Mr. Hinz take in the direction and management of the business of Dollcraft Co.? [101]

A. He doesn't take any management; he is in on policy making meetings.

Q. In the direction of policy?

A. That is right.

Q. And is that one of the matters that he attends to in behalf of the company, determining its policy on trade-marks? A. Legal, yes.

Q. In designing these dolls which have been identified here as "Who Am I Series," do you know where Mrs. Juster derived her ideas?

A. I guess from reading the stories. They are illustrated—so many of them are illustrated, and she probably leaves out features she doesn't like and adds features that would add to the attractiveness of the doll.

Q. In following up this research that you say she had made with respect to the foreign costumes, did she engage in that same practice with respect to the "Little Lady Series"?

A. There was no research on the "Little Lady Series"; but on the foreign dolls there were little things she had to leave off because otherwise you

(Testimony of Maurice Juster.)

would have had to price your dolls off the market. The detail was too great.

Q. In designing these dolls which ultimately became identified in the "Who Am I Series" as, say, "Red Riding Hood," do you know the source of the material from which Mrs. Juster derived her ideas for that costume? [102]

A. Probably any fairy tale or story book.

Q. How about the "Little Bo-Peep"? Do you know the source of that? A. The same way.

Q. You referred this morning to a booklet, Plaintiff's Exhibit 24, entitled "Hansel and Gretel."

A. Yes.

Q. Is that one of the reference books that Mrs. Juster referred to in designing any of her dolls?

A. This particular book was submitted to my wife by Joseph Horn; this is to copy as nearly as possible "Hansel and Gretel," because they were putting on a big store-wide promotion of "Hansel and Gretel," and they wanted the dolls dressed as near that as they could get it, and the samples we submitted met with their approval and they gave us the order.

Q. And in designing them the intent was to copy the figures as nearly as possible, is that correct? A. Yes.

Q. And this doll "Hansel"—

A. No, that is "Gretel"; "Hansel" is the boy.

Q. "Gretel," who is "Who Am I No. 208," is that the "Gretel" which you designed from that order? A. That is right.

(Testimony of Maurice Juster.)

Q. That was designed from the booklet which was submitted to you? [103] A. Yes.

Q. What was the name of that company that submitted it? A. Joseph Horn Company.

Q. I will direct your attention to the title page of the booklet, "Hansel and Gretel," Plaintiff's Exhibit 24, midway below the middle of the page the language, "Designed and produced by Spring House, Springfield, Massachusetts; copyright 1946 by Spring House, all rights reserved, including the right of reproduction in whole or in part in any form." Were you aware of that?

A. I take that——

Mr. Mellin: Just a moment. If your Honor please, he is not now charging the witness with infringing the copyright on behalf of somebody that isn't in court; I mean, that question is so far beyond the issues of this case, your Honor, that it is ridiculous.

Mr. Orr: If your Honor please, it illustrates the willingness of this organization to utilize the copyrighted material of other owners without regard to their property rights.

The Court: Are the other owners complaining?

Mr. Orr: The other owners are not complaining, so far as I know.

The Court: It has no place here then.

Mr. Mellin: As a matter of fact, if he let the witness compare the dolls, the witness would show certain characteristics [104] familiar to all Hansels

(Testimony of Maurice Juster.)

and Gretels, but not an exact duplicate of the book.

Q. (By Mr. Orr): Comparing now the doll, Plaintiff's Exhibit No. 23, with the picture of the little girl on the cover of the book, "Hansel and Gretel," Exhibit 24, will you please point out the essential differences that you find in those costumes?

A. Yes; on the booklet here she has puffed sleeves. She has a patch on her dress in the booklet. There is none on the dress. There is a patch on the boy's pants and so do we have a patch on the boy's pants, but not on his jacket. Colors have been changed, too, on his outfit.

The Court: Who made that objection?

Mr. Orr: I suggest, your Honor compare for yourself the costume of the young lady in the box and the young lady on the cover.

The Court: Assuming that he copied this, then where do we find ourselves?

Mr. Orr: Right where we are.

Mr. Mellin: We find ourselves in this position, your Honor: that because his "Hansel and Gretel," a storybook of a different kind, the plaintiff contends they have a monopoly on the use of Hansel and Gretel.

Mr. Orr: On the contrary, we never claimed exclusive rights in the name "Hansel" or "Gretel." They have been used [105] by "Nancy Ann" for a couple of years, but they have also been used by others.

Mr. Mellin: We will show that the others are shown to be of like appropriation of something that

(Testimony of Maurice Juster.)

doesn't belong to the defendant, and by their own admission.

Mr. Orr: I mentioned it in passing merely to indicate the willingness to trespass upon the property rights of others just as they have trespassed upon the rights of the "Nancy Ann" doll in appropriating their trade-marks and using them, so have they trespassed upon the copyrights of other manufacturers of material and of an exclusive right of reproduction in materials of certain figures that are copyrighted. I might mention at this time that a copyright is merely another matter of protecting property of this general character.

Q. Did you include in your first group of "Who Am I?" dolls the doll whom you intended to depict as "Alice in Wonderland"?

A. The copy of "Alice in Wonderland" was my own copy of "Alice in Wonderland." That wasn't too good on illustrations. All we could go by was her general little apron and the fact that she had blond hair.

Q. Was "Alice in Wonderland" included in the first group? A. Yes.

Q. That you made while you were still in partnership? A. Yes. [106]

Q. And among those that were put out without a designated name?

A. That is right. Is that registered, Mr. Orr?

Q. I was going to ask, did you make any in-

(Testimony of Maurice Juster.)

vestigation as to whether that name had been in use by others?

A. That, as I say, Mr. Hinz made all investigations on that order.

Q. This was before Mr. Hinz was in the picture, while you were operating as a partnership?

A. We didn't use any names.

Q. Oh, I see. So you didn't put a name on and make no investigation as to whether it had been used by others? A. No.

Q. And that first group of dolls that you put out without any designating information, were you aware that any of them had been used by the Nancy Ann organization for dolls?

A. Without names?

Q. In the group that you put out without names.

A. Yes.

Q. The "Who Am I Series"? A. Yes.

Q. Were you aware that the characters which you depicted by those dolls or intended to depict by them had been made the subject of trade-mark registrations of the Nancy Ann organization? [107]

A. Yes.

Q. You were aware of that. Was that one of the reasons that you avoided applying the name to the box or to the doll?

A. No. If I wanted to put the name on, I would have done it, just like some of the other doll companies did.

Q. And just as your company ultimately did?

A. There were—as I told you before, Mr. Orr, they were only brought about by the inquiries and

(Testimony of Maurice Juster.)

the requests of our customers to do so. We finally gave in.

Q. Referring to the advertisement which was published by Macy's, identified here as Plaintiff's Exhibit 46, will you state whether or not you find a designation of the dolls that are to be sold under that advertisement?

Mr. Mellin: Will you read the question?

(Question read.)

A. Yes.

Q. (By Mr. Orr): What is the designation?

A. "Red Riding Hood," "Little Bo-Peep," and "Sugar and Spice."

Q. Do you also find a designation in large type what the ad relates to?

A. The exclusive bisque story dolls. Can I add something?

Q. Yes. A. We did not write the ad.

Q. The ad was published with reference to dolls supplied by your company, was it not? [108]

A. Yes, but we don't pay for any advertising, Mr. Orr.

Q. How long before the publication of this advertisement was it that you sold the dolls to Macy's that are advertised in this particular issue of the paper?

A. If you will let me see the order, the invoice——

The Court: About a week, as I recall it, wasn't it?

A. About a week, yes, sir. Just about a week

(Testimony of Maurice Juster.)

from the time we shipped them until the ad appeared.

Q. (By Mr. Orr): And how long was it after the publication that the dolls were returned to you for credit?

A. Quite a while, I seem to recall. Look down here. There was a discrepancy from the time this sheet was made out until I received it and until a credit was made out.

Q. What was that?

A. Eighteen days—but it was in there some time.

Q. Were any other of the dolls which you sold to Macy's other than those included in this advertisement returned to you by Macy's?

A. No. All—yes, all the dolls under glass that were sold them were returned; all those that were not sold in the box.

Q. All under glass belonged to that same series, did they not?

A. Yes, but they are not all "Fairylend Series."

Q. What dolls are under glass other than those listed in your—— [109]

A. There are some of our "Glamor Series" and there is a bride, the "Romance and History Series."

Q. How many do you have under glass altogether? A. Twelve numbers.

Q. Are eight of the "Fairylend Series"?

A. Oh, no, there is four "Fairylend" out of twelve.

Q. The others are cellophane as in this type, is that right? A. That is right.

(Testimony of Maurice Juster.)

Q. Did the order to Macy's include any under cellophane? A. No.

Q. All under glass? A. Yes.

Q. This morning the correspondence, notices of infringement to certain customers, were put into evidence, including Macy's, Cliff House Gift Shop, and Victor Market.

A. Yes, and West Coast Five and Ten.

Q. West Coast Five and Ten. Do you know of any other customers of yours who received notices of infringement?

A. I don't know of any. The only ones I know of are those that were called to our attention.

Q. And you know of no other notices?

A. I don't know of any, no.

Q. Were any of your doll products sold prior to the time of these notices returned to you by any customer who, so far as you know, has not received a notice of infringement from the [110] Nancy Ann Company? A. No.

Q. No returns from any other customers?

Mr. Mellin: What was the answer?

Mr. Orr: The answer is "No."

There are no further questions at this time.

Redirect Examination

By Mr. Mellin:

Q. Mr. Juster, with respect to the "Fairyland Series" that have character names on the dolls which they portray, which of the doll exhibits 30 to 42, that is, the "Fairyland" dolls, each portrays a named character in nursery rhymes or story books,

(Testimony of Maurice Juster.)

isn't that a fact? A. That is right.

Q. And has such characteristics of those characters which it portrays as are found in story books and nursery rhymes? A. That is right.

Mr. Mellin: No further questions.

Recross-Examination

By Mr. Orr:

That makes it necessary for me to ask one further question.

Q. With reference to the doll that you have identified here as Plaintiff's Exhibit 37 and which bears the designation "Sugar and Spice," will you please tell me what nursery rhyme character that doll portrayed?

A. Being as I interpret it, I know that it happens to be [111] "Sugar and Spice."

Q. Is that a nursery rhyme character?

A. It is only a little rhyme, and about the only thing anybody can do with a two-line rhyme is to give their conception of something dainty, something sweet, and so they picked out something pink or blue. And that is her idea of something nice, sugar and spice.

Q. And that doesn't represent any particular character from nursery rhymes or fairyland, is that correct?

The Court: Sugar and spice makes everything nice. I think when I was a youngster I heard it.

Q. (By Mr. Orr): But what I mean is that this is not a character of fiction, as we will say

(Testimony of Maurice Juster.)

“Little Miss Muffett” or “Little Bo-Peep” are?

A. No; neither is “Alice in Wonderland.”

Q. What characteristic is there about her to designate any particular character from the nursery rhymes? A. The way she is dressed.

Q. If she isn’t a character, what characteristic indicates that character? In other words, she isn’t a character from fiction.

A. Well, let me put it this way: If she was to put in a very thin character out of a fairy tale, you can’t very well go ahead and make a doll very thin.

Q. Did you ever hear of a character in nursery rhymes called [112] “Sugar and Spice”?

A. I have read it, yes.

Q. I asked you if you ever heard of the character called that? A. No.

Q. Did you know at the time you adopted the name “Sugar and Spice” that the name had been registered as a trade-mark by the Nancy Ann organization? A. Maybe I had.

Mr. Orr: No further questions.

Mr. Mellin: Mr. Orr, may Mr. Juster be excused, if counsel is through with him, because there is no one down there to run the plant; his wife is ill. There are only the two of them. Are you going to have any further use for him?

Mr. Orr: I would rather have him remain here until we complete tomorrow’s proceeding. Some of the information Mr. Hinz is supposed to have could have been easily available to Mr. Juster and I may

want to question him a little bit more on that.

Mr. Mellin: Are you going to recess now or shall I commence a new witness?

The Court: You live in Oakland?

Mr. Mellin: Alameda; yes, your Honor.

The Court: All right. We will take an adjournment until 10:00 o'clock tomorrow morning.

(Thereupon an adjournment was taken to tomorrow, Tuesday, August 22, 1950, at 10:00 o'clock a.m.) [113]

Tuesday, August 22, 1950—10:00 A.M.

The Clerk: The case of Dollcraft Co., Inc., v. Nancy Ann Storybook Dolls, for further trial.

Mr. Mellin: Ready, your Honor.

The Court: Proceed.

Mr. Orr: There are just a few further questions I would like to ask Mr. Juster, with leave of Court, rather than interrupt the continuity of his testimony. It might be well to proceed at this time with counsel's consent.

Mr. Mellin: If it is proper cross-examination, your Honor, I guess I have no objection.

Mr. Orr: Mr. Juster, will you take the stand?

MAURICE JUSTER

recalled to the stand.

Recross-Examination

(Continued)

By Mr. Orr:

Q. I am not sure that it was made clear yester-

day, but Mr. Patterson represented you at the Toy Fair in New York in 1947, did he not?

A. No, sir, he did not.

Q. I will call your attention to the deposition taken on Friday, January 20, 1950, referring to pages 20 and 21, beginning at line 23. In answer to a question, your answer was:

“Wait a minute—wait a minute—wait a minute. I am getting my years all mixed up here. Yes, wait a second. In 1947 I was still selling the dolls, and Mr. Patterson’s [114] daughter represented us on the Coast here and Mr. Patterson didn’t take the dolls to New York until 1948, the 1948 Toy Fair, and the 19—gosh! No, I am all mixed up—By Jingo! He did; he took it in ’47 and ’48; that’s right—yes, he did. It’s ancient history now.”

Do you recall making that answer?

A. I guess so. If I said it, then I am confused again.

Q. Is your recollection now different than it was when you gave that deposition?

A. No; I guess you have me confused, Mr. Orr. I can’t recall. I definitely know that he had them in ’48, but I can’t recall whether he did in ’47. I know he did sell some dolls for us in ’47, but I seem to think it was later on in the year.

Q. You do recall, however, definitely that he was representing you at the time you brought out your line of “Who Am I?” dolls? A. Yes.

Q. It was Mr. Patterson who introduced you to Mr. Kerr and Mr. Hinz, isn’t that so?

(Testimony of Maurice Juster.)

Mr. Mellin: If your Honor please, I do not object to further cross-examination, but we are going over exactly the same ground as we went over yesterday and it seems to be a duplication. He asked him yesterday about Mr. Patterson introducing him to Mr. Hinz four times, because we almost objected yesterday to the repetition. Now we are going on again. [115]

Mr. Orr: I may have further questions as to the testimony that he gave yesterday.

Q. Did you answer?

A. Yes, I answered that, sir, that Mr. Patterson did introduce me to Mr. Kerr and Mr. Hinz.

Q. During the discussion with regard to the formation of a corporation, was there any discussion as to whether or not Mr. Patterson should participate in the organization?

A. I can't recall that, no; I don't know at the meetings the identical words.

Q. Do you have any recollection as to whether he considered coming into the corporation?

Mr. Mellin: How would this witness know whether Mr. Patterson considered coming into the corporation?

Mr. Orr: I am asking him if there was any discussion regarding that.

The Court: Was there any discussion had in that regard?

A. I don't know, your Honor; all I know is that the only time—the only time that I am sure that Mr. Patterson was interested was before the name

(Testimony of Maurice Juster.)

of Mr. Kerr and Mr. Hinz arose as to forming a corporation. That is the only time that I am sure that Mr. Patterson was interested.

Q. (By Mr. Orr): You have no further recollection as to whether it was ever discussed that he might participate in the [116] formation of the corporation? A. I just said no.

Q. Is Mr. Patterson still representing your organization in the sale of dolls?

A. I told you yesterday no.

Q. When did that employment terminate?

A. I told you that it had terminated at the end of 1948.

Q. And what was the reason for the termination, do you recall?

A. Mr. Patterson felt he could make more money with a different line, a line of plastic musical dolls out of Southern California.

Q. Going to another subject. You referred yesterday to the advertisement published by Macy's in the San Francisco paper. Do you know of any other advertisements of your doll products in that period from that time to Christmas, say?

A. No, sir, I don't know of any other advertisements.

Q. Also yesterday you identified certain orders which you received in which the dolls were designated by name rather than by number alone?

A. Yes, sir.

Q. Do you recall whether those orders were re-

(Testimony of Maurice Juster.)

ceived before or after you began applying the names to the boxes containing the dolls?

A. I will have to see the orders.

Mr. Orr: Exhibit 44 for one, and 44 or 45 (handing papers [117] to witness).

A. This was before we began applying the names on the boxes.

Q. How were the names of the individual dolls made known to them? A. Pardon me?

Q. Do you know how the names were made known to the people who ordered the dolls?

A. I go on the assumption that they recognized the name from the way the doll was dressed.

Q. You feel that the appearance of the doll was sufficient to enable the person making the order to identify the doll by its name? A. Yes.

Q. I will ask you to examine a specimen of doll which was identified in connection with the deposition of Mr. Rowland taken Wednesday, December 14, 1949, and identified therein as Exhibit 6, and ask you if looking at the doll but without examining the label which appears upon its wrist, you can tell me what character that doll represents.

A. I couldn't tell you.

Q. I will direct your attention to a second doll which was identified in connection with Mr. Rowland's deposition on December 14, 1949, as Exhibit 8 for identification, and ask you if you look at that doll without examining the wrist label on the doll, you can tell what character that represents. [118]

A. I can't identify that one either.

(Testimony of Maurice Juster.)

Mr. Mellin: These are Defendant's dolls, Nancy Ann dolls.

Mr. Orr: These are Nancy Ann dolls, produced in connection with the deposition of Mr. Rowland on December 14, 1949.

Q. I will direct your attention to another doll produced in connection with Mr. Rowland's deposition designated and identified therein as Exhibit 14, and ask you if you can determine from the appearance of that doll what character it represents or depicts? A. I can't tell you that one either.

Q. I will further direct your attention to a doll produced in connection with Mr. Rowland's deposition and identified therein as Exhibit 4, and ask if you can tell from the appearance of that doll what character it represents?

A. No, I can't tell you that one either.

Q. I direct your attention to another doll produced in connection with Mr. Rowland's deposition and identified therein as Exhibit 10, and ask you if you can tell me from the appearance of that doll what character it represents.

A. I can't tell you that one either.

Q. I direct your attention now to a doll produced in connection with Mr. Rowland's deposition identified therein as Exhibit 12, and I will ask you if you can tell from the appearance of that doll what character it represents?

A. I can't tell you that one either. [119]

Q. Directing your attention now to a doll produced in connection with Mr. Rowland's deposition

(Testimony of Maurice Juster.)

and identified therein as Exhibit 16, I will ask you if you can tell from the appearance of that doll what character it represents.

A. I can't tell you that either.

Q. I will direct your attention to another doll produced in connection with Mr. Rowland's deposition and identified therein as Exhibit 2, and ask you if you can identify what character that doll represents.

A. That one I can recognize. That is possibly "Red Riding Hood"; I think it is.

Mr. Orr: I would like at this time to offer in evidence the dolls which have just been shown to the witness. I will offer first the doll last referred to by the witness, which he said would probably be "Little Red Riding Hood," which doll was identified in the taking of Mr. Rowland's deposition as Exhibit 2, and I will ask that that be marked Defendant's Exhibit 1.

The Court: Let it be admitted.

Mr. Orr: By number or by letter, your Honor?

The Court: I leave it to the Clerk. He is responsible.

The Clerk: A.

(The doll referred to was thereupon marked Defendant's Exhibit A in evidence.)

Mr. Orr: I will next offer the doll identified in connection with the Rowland deposition as Exhibit 4 and ask that it [120] be placed in evidence here as Defendant's Exhibit A-1.

(Testimony of Maurice Juster.)

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit A-1 in evidence.

(The doll referred to was thereupon marked Defendant's Exhibit A-1 in evidence.)

Mr. Orr: I next offer the doll identified in Mr. Rowland's deposition as Exhibit 6 as Defendant's Exhibit A-2.

The Court: Let it be admitted.

(The doll referred to was thereupon marked Defendant's Exhibit A-2 in evidence.)

Mr. Orr: Let me state at this time that Exhibit A was, as Mr. Juster supposed, "Little Red Riding Hood." Exhibit A-1 is "Sugar and Spice," and Exhibit A-2 was "Little Bo-Peep."

I will now offer the doll identified in connection with Mr. Rowland's deposition as Exhibit 8, as Defendant's Exhibit A-3. The name of that doll is "Mistress Mary."

The Clerk: A-3 in evidence.

(The doll referred to was thereupon marked Defendant's Exhibit A-3 in evidence.)

Mr. Orr: I next offer the doll identified in connection with Mr. Rowland's deposition as Exhibit 10, in this proceeding as Defendant's Exhibit A-4. The name of the doll is "Curly Locks."

The Clerk: A-4. [121]

(Testimony of Maurice Juster.)

(The doll referred to was thereupon marked Defendant's Exhibit A-4 in evidence.)

Mr. Orr: I next offer the doll identified in the deposition as Exhibit 12, as the Defendant's Exhibit A-5. The name of the doll is "Goldilocks."

(The doll referred to was thereupon marked Defendant's Exhibit A-5 in evidence.)

Mr. Orr: I next offer the doll previously identified as Exhibit 14 in Mr. Rowland's deposition as Exhibit A-6. The name of this doll is "Little Miss Donnett."

The Court: Let it be admitted and marked.

The Clerk: A-6 in evidence.

(The doll referred to was thereupon marked Defendant's Exhibit A-6 in evidence.)

Mr. Orr: I next offer the doll identified as Exhibit 16 in connection with Mr. Rowland's deposition as Defendant's Exhibit A-7. This doll is "June Girl."

The Court: Let it be admitted and marked.

The Clerk: A-7.

(The doll referred to was thereupon marked Defendant's Exhibit A-7 in evidence.)

Q. (By Mr. Orr): Yesterday—Monday, that is—you identified one as "Sugar and Spice." Will you tell me where you ever saw a picture of Sugar and Spice?

(Testimony of Maurice Juster.)

A. I didn't design the doll, Mr. Orr. I may have seen a [122] sketch in several books; I can't go back to the days I was reading them.

Mr. Orr: That will be all.

Mr. Mellin: No questions.

Call Mr. Rowland.

May I ask counsel through your Honor if he would now excuse Mr. Juster so he can take care of his business. There are only two of them, and his wife is ill.

Mr. Orr: I think we are through with him.

Mr. Mellin: That is very kind of you, Mr. Orr; I appreciate that.

The Court: He will be available when you want him?

Mr. Orr: It is a question whether we need him this afternoon in connection with some of the examination of Mr. Rowland.

The Court: All right.

ALLAN L. ROWLAND

called by Plaintiff under Federal Rules of Civil Procedure, Rule 43(b); sworn.

Direct Examination

By Mr. Mellin:

Q. Would you give your full name, your age and your address, Mr. Rowland?

A. Allan Leslie Rowland, age 50, 1980 Washington Street.

Q. And what is your occupation, Mr. Rowland?

(Testimony of Allan L. Rowland.)

A. Secretary and Treasurer of the Nancy Ann Storybook Dolls, [123] Incorporated.

Q. That is the defendant here?

A. Yes, sir.

Q. And when was that corporation organized?

A. The early part of 1946.

Q. And it succeeded a co-partnership, did it?

A. Yes, sir.

Q. And the co-partnership succeeded a corporation?
A. Yes, sir.

Q. And those changes were made not because of a shift in interests, but for tax or other purposes?

A. For business purposes, yes, sir.

Q. How long have you been intimately associated, that is active in the management, of the business?

A. Since the inception of the business.

Q. In '38 or '39? A. '37.

Q. You take charge of all the executive end of the business?
A. Yes, sir.

Q. Isn't that correct? A. Yes, sir.

Q. With respect to trade-marks, you also in your executive capacity take charge of the legal matters in conjunction with registering them, and what have you?
A. That is correct. [124]

Q. So you are thoroughly familiar with all of the trade-marks of the corporation, aren't you?

A. Yes, sir.

Q. And you are also familiar with the sales representatives and the sales matters of the company?
A. Yes, sir.

(Testimony of Allan L. Rowland.)

Mr. Mellin: You will stipulate, of course, Mr. Orr, that Mr. Rowland is an adverse witness? Won't you stipulate to that either?

Mr. Orr: Of course we will stipulate to that.

Q. (By Mr. Mellin): Mr. Rowland, on page 50 of your deposition, which was taken on December 14, 1949, on page 50 commencing on line 22, you were asked this question:

“Q. Now I asked you to—I show you Exhibits 1 and 2, and I will ask you if the two dolls in those two exhibits are dressed alike?

“A. No, sir, they are not.”

That question was asked you and you gave that answer, didn't you? A. Yes, sir.

Mr. Mellin: May it be stipulated that Exhibit 1 to Mr. Rowland's deposition, which that question referred to is “Little Red Riding Hood,” Plaintiff's Exhibit 30 produced by Dollcraft, and Exhibit 2 is a “Little Red Riding Hood” introduced as Defendant's Exhibit A. [125]

Q. Do you recall that question and that answer?

A. Yes.

Mr. Orr: At this time I would like to make the general objection to this comparison of the dolls themselves, because the dolls are not in issue; it is a matter of trade-marks that are being used on the dolls, not the dolls. Similarities and dissimilarities of the dolls have nothing whatever to do with this proceeding.

Mr. Mellin: If your Honor please, it is only a preliminary question, just to identify.

(Testimony of Allan L. Rowland.)

“Q. And you would not mistake one from the other, as far as the dress is concerned?”

The answer was:

“A. No, but I would mistake it for “Red Riding Hood.”

That question was asked you and you gave that answer, did you not? A. Yes, sir.

Q. And that answer is a correct one?

A. Yes, sir.

“Q. You mean you would identify each of the dolls—even if it were not named, you would identify them——

“A. As ‘Red Riding Hood.’ ”

That question was asked you and you gave that answer, didn’t you? A. That’s right. [126]

“Q. As representing ‘Red Riding Hood’?

“A. That is correct.”

That question was asked you and you gave that answer? A. That is right.

Q. Now, isn’t it a fact, Mr. Rowland, that the name “Little Red Riding Hood” was adopted by you and applied to a doll because that doll in appearance simulated a well-known storybook character?

A. No. It was Nancy Ann’s interpretation of “Red Riding Hood.”

Q. And the fact that it is similar to “Red Riding Hood” had nothing to do with your adopting the name “Red Riding Hood” for that doll; is that your answer?

(Testimony of Allan L. Rowland.)

A. As I say, it is her interpretation of what Red Riding Hood looked like, and that is why the mark was adopted.

Mr. Mellin: May that question before the last be read to the witness by the reporter?

(Reporter read the question as follows:)

“Q. Now, isn’t it a fact, Mr. Rowland, that the name ‘Little Red Riding Hood’ was adopted by you and applied to a doll because that doll in appearance simulated a well-known story-book character?”

A. Yes, it is.

Q. And now, would you turn to page 59 of your deposition wherein we referred to “Little Bo-Peep” dolls, and line 17. [127] You had before you at that time, didn’t you, Plaintiff’s Exhibit 31 in this case and Defendant’s Exhibit A-2? A. Yes, sir.

Q. Which were Exhibits 5 and 6 in your deposition? A. Yes, sir.

Q. And this question was asked you, was it not:

“Q. I will ask you whether or not, except for what you said was a similarity of features and size, whether or not there is any other similarity between the dolls not common to all dolls? A. Yes, it is confusingly similar.

“Q. In what way, please?

“A. To a little girl they are both ‘Bo-Peep’ dolls.

“Q. You mean similar in that they are both ‘Little Bo-Peep’?

(Testimony of Allan L. Rowland.)

“A. That is correct, and the average little girl know that a ‘Bo-Peep’ is a Storybook Doll.”

Those questions were asked and you gave those answers? A. Yes, sir.

Q. And what you said as to the name Red Riding Hood designating a storybook character, that goes also for Little Bo-Peep?

A. No, the Storybook “Red Riding Hood” doll had a very definite red cape on it. It was very much on the—very different than these dolls here. The only thing—

Q. Then what did you—Pardon me. [128]

A. The only thing a little girl knows the Storybook “Bo-Peep” dolls by is by a label on the box.

Q. I see; they don’t know it by the nursery rhyme or storybook character?

A. They probably know it by the storybook character, but this is not particulary descriptive of Bo-Peep.

Q. The “Little Bo-Peep” doll Exhibit A-2 was somebody’s conception of the storybook character Little Bo-Peep, isn’t that correct?

A. That is correct.

Q. And the name “Litle Bo-Peep” was adopted for that doll because it was the conception of somebody of what Little Bo-Peep was in nursery rhymes, is that right?

A. No, it was not adopted for that doll; it was adopted for a doll.

(Testimony of Allan L. Rowland.)

Mr. Mellin: Would you read the question to the witness?

(The reporter read the question.)

A. No, I repeat my answer, that the name was not adopted for that doll; it was adopted for a doll which we later called "Bo-Peep."

Q. And because of the fact that it was somebody's conception of what Bo-Peep, the nursery rhyme character, would look like?

A. Yes, sir.

Q. And that, in substance, is true of all of the other storybook character dolls, that your company puts out today, to wit: [129] "Little Miss Muffett," "Little Miss Donnett" and so on?

A. It is Nancy Ann's version of the doll.

Q. Of the particular character in the nursery rhymes or storybooks? A. That is correct.

Q. Now, on page 71 of your deposition, you were asked this question:

"Q. It is your contention, then, as I understand it, with respect to the names of these dolls, that you are entitled under what you call your ideology and your registrations of trademarks named in the pleadings, to the exclusive use, for example, the name 'Little Red Riding Hood' as pertaining to a doll which represents that fictional character?

"A. That is correct, and the specific numbers mentioned in the counter-claim.

"Q. And each of those? A. Yes."

(Testimony of Allan L. Rowland.)

The Witness: Where are you reading?

Q. I beg your pardon. I gave you page 71, it was on line 15. I read it correctly, didn't I, Mr. Rowland, your answer?

A. Yes, sir, that is correct.

Q. Those questions that I just read you and the answers I read you were asked you and you answered them? A. Yes, sir. [130]

Q. The way I read? A. Yes, sir.

Q. And the answers are correct?

A. Yes, sir.

Q. Now, Mr. Rowland, when you made application—and I notice that you have signed all of these applications for registering trade-marks—you recall the circumstances to some extent, don't you, of filing for them? A. Yes, sir.

Q. At any time, to your knowledge, did you ever advise the patent office that this trade-mark, for example, "Little Red Riding Hood," was for a doll simulating Little Red Riding Hood, to your knowledge?

A. Simulating Little Red Riding Hood?

Q. Or dressed to represent Little Red Riding Hood? A. No, I don't think so.

Q. In other words, what you did to the Patent Office was to represent that this trade-mark "Little Red Riding Hood" was merely applied to a doll, with no other description of the doll, so the Patent Office would have no knowledge that it was applied to a doll dressed to represent that character; isn't that the fact?

(Testimony of Allan L. Rowland.)

A. I think that is a purely legal question.

Mr. Orr: I object to this kind of cross-examination here. If the Patent Office had deemed that of any materiality, they [131] would have asked specifically for it. But the Patent Office did not go into that. Whatever the dress, whatever the appearance, whatever the kind of doll may be involved makes no difference. It is for dolls of the classification and the kind, and the dress is immaterial. It is just immaterial. Seventeen designers will design seventeen different representations of the same character. If they were limited down to a particular dress, it would be the equivalent merely to the copyright on a particular costume in the granting of the trade-mark in the class of the dolls, so that this implication that there was any irregularity in not specifying the manner of dress of the doll is completely out of the case.

The Court: I will let him develop the fact, whatever it may be. The application was for a doll?

A. Yes, sir.

Mr. Orr: The application specifically states it is for dolls, and doll's clothing in the class indicated.

Mr. Mellin: The question I asked him was whether or not to his knowledge at any time did they advise the Patent Office and say to the Patent Office in specification of the doll they were trade-marking that it was a doll that answered or simulated a "Little Red Riding Hood" doll, other than just dolls generally.

Mr. Orr: Again I say it is completely immaterial

(Testimony of Allan L. Rowland.)

and there is no occasion for it, and the Patent Office didn't ask [132] for it, and it would make no difference if they had.

Mr. Mellin: We charge here, and we will develop the fact on argument, that the first time that the Patent Office actually knew that these terms were used descriptively was the time during the contest between this defendant and some other company over the trade-mark, and the Patent Office discovered at that time that the dolls actually used in these classifications were characters or more or less visual representatives of actual characters, and then the Patent Office ruled that, in fact, all trade-marks of this class were purely descriptive. And we maintain that, had the Patent Office known at the time these registrations were applied for, had the Patent Office known at that time, for example, that the "Little Red Riding Hood" trade-mark was applied to a "Little Red Riding Hood" doll, that is, a doll representing that character, that registrations never would have been issued.

Mr. Orr: I completely disagree with Mr. Mellin. When, as and if he develops that in argument, I will be very glad to answer it. I am not going to give a complete and satisfying answer at the present time; I don't think it has any part in the examination of this witness.

The Court: It may or may not have; I am not prepared to say at this time. For that reason I will overrule the objection so that he may have a record on it. You can argue on both sides. [133]

(Testimony of Allan L. Rowland.)

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The Court: It may or may not have; I am not prepared to say at this time. For that reason I will overrule the objection so that he may have a record on it. You can argue on both sides. [133]

(Testimony of Allan L. Rowland.)

Q. (By Mr. Mellin): You recall the question, Mr. Rowland?

A. Please repeat it.

(The reporter read the question.)

Mr. Orr: I would like to renew my objection on a further ground: that the file wrapper of this particular application and others has already been offered in evidence by counsel, and the file wrapper speaks for itself. And in any event those matters are left to counsel, the individual officer bringing the instrument instructs the filing of a trade-mark application and the attorney handles the legal matters with the Patent Office.

The Court: Let him develop the fact, whatever it may be. The description was a doll?

Mr. Mellin: Doll and doll clothes and nothing else.

The Court: That is all?

Mr. Orr: If that is the extent of the inquiry, my objection still stands.

The Court: Let the objection stand. I will allow it subject to his motion to strike. It may or may not become material.

A. To the best of my knowledge, no copy of the doll was submitted to the Patent Office, if that is what you want.

Q. And that was true of the registrations "Red Riding Hood," "Miss Muffet," "Little Bo-Peep," "Mistress Mary," "Little Miss Donnett," "Goldilocks," "Sugar and Spice," and "Storybook [134]

(Testimony of Allan L. Rowland.)

Story," "Fairyland" and "June Girl"; is that correct?

A. That is correct. If our attorney didn't want additional information, such as a copy of the doll or something to submit—that I can not recall.

Q. But as far as you know, no dolls were ever submitted? A. No, sir.

Q. I call your attention to the registration of the word "Story," registration 25896, registered June 6, 1950, on an application of November 28th, 1940, for dressed dolls in class 22—and that is Plaintiff's Exhibit 9-A—and ask you to tell me what dolls did you apply the word "Story" to?

A. Well, I don't have to read it to tell you that. We applied it to various dolls throughout the line from time to time.

Q. What do you mean?

A. We put in an additional wristlet on the wrist of these dolls other than the ones bearing the label of the doll.

Q. In other words, from time to time—any particular line of your dolls?

A. No, no particular line of our dolls.

Q. In other words, you followed the practice that you have previously testified to in another situation, that you instructed the shipping department occasionally to put labels on them so that you could comply with the steps required for registration of the word, isn't that correct?

A. To show use. [135]

(Testimony of Allan L. Rowland.)

Q. Just to show use. So you used it at intervals? A. We used it about half the time.

Q. And half the time you left it off?

A. Yes, sir.

Q. And the purpose of that was to show use of a trade-mark registration, is that it?

A. That is correct.

Q. And as a matter of fact, that is what you did with these trade-marks "Fairyland" and "Storybook," isn't that so?

A. No; "Storybook" was on all the dolls all the time.

Q. And on the labels?

A. On the labels at all times.

Q. So that then each doll would carry at least three trade-marks, wouldn't it? A. No.

Q. How many trade-marks would it carry?

A. It would carry the one trade-mark, "Storybook Dolls," which is on every doll.

Q. Yes?

A. And then occasionally it would carry "Story," and "Nursery Rhymes" was used occasionally, and "Fairy Tales" also on the box.

Q. So then it is my understanding of your testimony it would have the three trade-marks: one, "Storybook"; two, "Little Red Riding Hood," if it was Little Red Riding Hood; and three, [136] it would have "Story" or "Fairyland" or something else?

A. In some cases, yes, sir, that is correct.

(Testimony of Allan L. Rowland.)

Q. And other than the word "Storybook," these other trade-marks were shifted; in other words they worked in shifts; you would put on "Story" for a while and then put "Fairylan" on them for a while, and one of the other trade-marks on for a while? A. That is correct.

Q. In other words, that was part of the policy to attempt to monopolize those various words and secure their exclusive use for Nancy Ann?

A. Not to monopolize them, no.

Q. I don't use that in a vicious sense, Mr. Rowland; I mean to keep it exclusive to yourself?

A. Yes, sir.

Mr. Orr: Your question, of course, is confined to use on dolls.

Mr. Mellin: To the ones that they were applied to, and I am speaking now particularly of "Fairylan" and "Story" and "Nursery Rhymes"; they were applied to the dolls of these nursery rhyme characters, weren't they, and storybook characters such as we have been discussing here?

A. Yes, sir.

Q. They weren't put on any other dolls?

A. Yes, they were put on all the dolls. [137]

Q. Every doll in your line?

A. We didn't limit them to any certain series of dolls.

Q. In other words, you put "Nursery Rhyme Dolls" on dolls representing foreign nations?

A. No, no, not in that sense of the word; I am talking particularly about the one in question, which is "Story."

(Testimony of Allan L. Rowland.)

Q. "Story Dolls" went on each?

A. "Story Dolls" was put on any one of the ones in our line.

Q. When did you first start putting on the word "Story" on these dolls, as you have testified, Mr. Rowland?

A. Mr. Mellin, without looking at the application and going back to the record, I couldn't tell you.

Q. I will tell you what the application says. It says May 10, 1947.

A. It was approximately that time; the application is right.

Q. Do you recall that independently or do you just take the application's word for it?

A. I take the application's word for it; I signed it.

Q. When you see the word "Story" disassociated from the word "Dolls," do you take that to mean Nancy Ann Dressed Doll Company?

A. Any Nancy Ann Storybook Doll.

Q. And that would be true of "Nursery Rhymes"? When you see the words "Nursery Rhymes" disassociated from the word "Dolls" does that immediately mean Nancy Ann Dressed Doll Company to you? [138]

A. Yes, sir.

Q. And that would be true of "Story Book"?

A. As far as "Storybook Dolls" is concerned, yes.

Mr. Mellin: I have, Your Honor, here a certified copy of the file wrapper and contents of opposition No. 24,874, Nancy Ann Dressed Dolls—

(Testimony of Allan L. Rowland.)

Nancy Ann Storybook Dolls, Inc., asking to be substituted—vs. Ippolito, as to trade-marks for dolls dated the 7th day of December, 1949. I ask that be marked for identification as the Plaintiff's next in order.

The Court: Let it be marked.

The Clerk: Plaintiff's Exhibit 55 for identification only.

Mr. Orr: At this time I would like to call attention of the Court and counsel that the proceeding as recorded in this file wrapper has not been completed and that an appeal is pending in the United States Court of Customs and Patent Appeals.

Mr. Mellin: I shall not only advise you of that, but I shall file a certified copy of that opinion at the end of this.

Mr. Orr: Of the opinion?

Mr. Mellin: Of the Court of Customs and Patent Appeals.

The Court: That is only going in for the purpose of identification.

Mr. Mellin: To save time, Your Honor, I am going to introduce this on the theory of introducing admissions and statements against interests of the defendant.

Q. Now, Mr. Rowland, you recall that you testified in that [139] matter just referred to, didn't you?

A. On the Ippolito case?

Q. Yes, A. Yes.

Q. And you worked rather closely with counsel

(Testimony of Allan L. Rowland.)

in connection with that case? A. Yes, sir.

Q. You recall that it was the position of the defendant here, Nancy Ann Dressed Dolls, that the words "Nursery Rhymes" were synonymous with "Storybook," "Mother Goose," and things of that sort?

A. Yes, sir. Are you pertaining to the Nancy Ann Storybook Doll Corporation or the old corporation? You always use the old name.

Q. I will speak of them collectively.

A. All right; fine.

Q. And that is still your contention, isn't it?

A. Yes, sir.

Q. So that, as far as your position is concerned here, the words "Storybook," "Nursery Rhymes," "Mother Goose," "Fairylane" are all synonymous terms, all of which would call to mind, when applied to the fictional characters, all would call to mind the same general fictional characters, isn't that correct?

A. That is a Storybook Doll.

Q. And when someone says, "Little Red Riding Hood," [140] immediately to you that means a Storybook Doll dressed like Little Red Riding Hood; that is correct?

A. Not only to me, but it means that to every youngster in the country.

Q. And regardless of the type of miniature doll, Mr. Rowland? A. Yes, sir.

Q. So that when they see a Hallmark Doll made out of paper, that would be a Storybook Doll to the youngster?

(Testimony of Allan L. Rowland.)

A. That is a paper doll. You are going into something entirely different.

Q. It is still a small doll.

Q. We are talking about miniature dolls. That is a piece of paper, that is a paper doll. It has nothing to do with the doll industry or anything. The youngsters call them little paper dolls.

Q. They simulate Little Red Riding Hood and have "Little Red Riding Hood" printed on them. They wouldn't associate that with Nancy Ann Doll Company? A. I don't believe they would.

Q. And so in that instance when you see "Little Red Riding Hood" on a picturization of Little Red Riding Hood in the form of a paper doll, you wouldn't associate that with Nancy Ann Dressed Dolls Company? A. I would not.

Q. That would mean some other company, Hallmark, for example? [141]

A. It would mean a paper doll.

Q. That is all? A. Yes.

Q. To your knowledge, Mr. Rowland, how long have paper dolls been made and marked with Nursery Rhyme characters? We will take the one Little Red Riding Hood, to your own knowledge.

A. I couldn't say.

Q. Will you say since 1890?

A. I wouldn't attempt to say, because I never investigated.

Q. You know that they were produced prior to the inception of the Nancy Ann Dressed Dolls, don't you?

(Testimony of Allan L. Rowland.)

A. No; I never play with dolls so I really am not cognizant of the fact they were manufactured. I couldn't say truthfully.

Q. But you have made some investigation, haven't you? A. Not paper dolls, I have not.

Q. Let's take other dolls. How long have you known of any other dolls that were called, for example, "Little Red Riding Hood"?

A. I have never heard of one called "Little Red Riding Hood," with one exception.

Q. What was that?

A. That was a company that went defunct, was using the name "Red Riding Hood," in which we made a full investigation, found out the company was broke, and we started using the name, and after due course we applied for registration of the name. [142]

Q. But you know now that it is rather common throughout the country and widely dispersed, these little paper dolls?

A. I don't think they are. From what I understand, the company is discontinuing them; they are not very successful.

Q. You happen to know they are on sale right here in San Francisco? A. Yes.

Q. In fact, right next to the courthouse?

A. They are on the rack. They are not being sold, very many of them, so therefore they are fast disappearing from the market.

Mr. Mellin: May we have a recess?

(Testimony of Allan L. Rowland.)

The Court: We will take a recess.

(Recess.)

Q. (By Mr. Mellin): Mr. Rowland, before recess we were speaking of paper dolls, and you recalled, as I recall it, the small paper dolls which are put out by Hallmark. And I show you a Little Red Hiding Hood, so marked, and ask you if that is one of those we had reference to?

A. It is.

Q. And "Little Bo-Peep"? A. Yes, sir.

Q. And "Mary, Mary, Quite Contrary"?

A. Yes, sir.

Q. And "Little Miss Muffett"? And "Little Girl with a Curl"? [143] A. Yes, sir.

Q. Now, I call your attention that in each envelope for this there is a list of dolls. Would you read this into the record, please?

A. "Little Bo-Peep," "Cinderella," "Mary, Quite Contrary," "Mary Had a Little Lamb," "Little Red Riding Hood," "Little Miss Muffett," "Tommy Tucker," "Little Boy Blue," "My Pretty Maid," "Little Girl With a Little Curl," "Queen of Hearts," "Bobby Shaftoe," "Little Polly Flinders," "Curlilocks," "Polly Put the Kettle On," and "Peter Piper." There is also "Dolls of the Nations." Do you wish that?

Q. Thank you, no.

And all of these marks you recognize from your knowledge of the business were all put out by Hallmark Company in that fashion?

(Testimony of Allan L. Rowland.)

A. Of these that you identified, yes, sir.

Mr. Mellin: I will offer that group of paper dolls in evidence as the next exhibit.

Mr. Orr: Objected to as wholly irrelevant and immaterial in this proceeding.

The Court: Indicate the purpose of the offer for the record.

Mr. Mellin: The purpose is to show that there has been no exclusive use of these character names for dolls by this defendant. [144]

The Court: For that limited purpose, I will allow it.

Mr. Mellin: May we put them in just as one exhibit, your Honor?

The Court: Very well.

(Whereupon the paper dolls referred to were marked Plaintiff's Exhibit No. 56 and received in evidence.)

Q. (By Mr. Mellin): You notice that on each of these dolls, like the one that represented Little Red Riding Hood, it had the notation "Red Riding Hood" on it? A. Yes, sir.

Q. And that was true of "Bo-Peep" and the rest of them? A. Yes, sir.

Q. And you would say that those dolls so designated would not tend to lead anyone to believe that they were Nancy Ann dolls? A. Yes, sir.

Q. In other words, there would be no confusion between the source of the paper dolls, for example, because of their names, one named "Little

(Testimony of Allan L. Rowland.)

Red Riding Hood," and a Nancy Ann doll "Little Red Riding Hood"? There would be no confusion in anyone's mind as far as you are concerned, that those dolls were produced by Nancy Ann?

A. Mr. Mellin, there has been quite a bit of confusion. I think when they first came out the general public believed that those dolls were being put out by Nancy Ann.

Q. But as you stated before recess, as far as you could see, [145] there would be no confusion?

A. Not now, no.

Q. Would you say that the trade-mark that you have used, as you have testified, "Nursery Rhymes" as applied to characters, fictional characters in nursery rhymes, would be descriptive of those dolls?

A. No, sir, it would not be descriptive; it is only descriptive of the ones that we have designated as "Nursery Rhyme Dolls."

Q. "Nursery Rhyme Dolls." That term would be descriptive and particularly apply to those dolls in that class?

A. To those dolls and to those dolls only.

Q. You have never taken a contrary position, have you? A. Not to my knowledge.

Q. Do you know from your experience in this trade-mark litigation that you have been involved in what is meant by the "generic" as applied to a trade-mark? A. Well, the use of it.

Q. Yes, if it is generic to the goods.

(Testimony of Allan L. Rowland.)

A. It is synonymous, to be used at the same time with the goods.

Q. Yes? A. Yes.

Q. In other words, generic would be like, let us say, automobile is generic to an automobile. Would you say then that [146] the trade-mark "Nursery Rhymes" would be generic to dolls representing fictional characters of nursery rhymes?

A. Only to those that we have put out.

Q. Now, you know the Hollywood Doll Company, don't you, and its products? A. Yes.

Q. In fact, you know them rather well?

A. Yes, sir.

Q. Do they put out any miniature dolls representing fictional characters? A. Yes, sir.

Q. Can you tell us if you know which ones they are?

A. Offhand I can not. They have a list of about a hundred dolls.

Q. And do they include "Little Red Riding Hood"? A. No, sir; no more.

Q. No more? A. No, sir.

Q. The reason that it doesn't is by an agreement with the Nancy Ann Doll Company, isn't it?

A. They never used "Red Riding Hood"; they used "Little Red."

Q. "Little Red"?

A. Yes, and they agreed to discontinue that.

Q. And do they make any of the fictional characters that you [147] do?

(Testimony of Allan L. Rowland.)

A. Nothing that conflicts with our line.

Q. Like "Little Goldilocks" and so on?

A. I don't believe they use "Goldilocks." After all, there is thousands of characters they can use; they don't have to copy our line now.

Q. I see. You did take the position before the Patent Office, didn't you, that the trade-mark "Nursery Rhymes" was descriptive of dolls representing nursery characters—nursery rhyme characters, didn't you?

A. Put out by us, yes sir.

Q. And that was the basis of your opposition to the registration of the trade-mark "Nursery Rhymes" by Ippolito, isn't that correct—Hollywood Doll Company?

A. I believe it was; I would have to check with my counsel to make sure.

Q. You recall the decision coming down in that case, don't you?

A. Yes, sir.

Q. In which the—just a minute; let me get my question in, Mr. Orr, then you can object. And you recall, in substance, that the Patent Office held that the trade-mark, or alleged trade-mark "Nursery Rhymes" was descriptive of a class of nursery rhyme characters, do you not?

Mr. Orr: I object to the question on the ground that the [148] record of the proceedings has already been offered in evidence. The record speaks very clearly of what the decision has been, and it is not fair to this witness to question him on the

(Testimony of Allan L. Rowland.)

terminology and the details of the procedure which were handled by his counsel representing him in the Patent Office; that the record already produced here in evidence shows that there is an appeal still pending. It is unfair to this witness to continue asking him details of the terminology of language which require reading and understanding of the entire record to show their true value.

Mr. Mellin: I would like to suggest to the Court the reason I am asking the question. I am not asking about details of terminology.

Mr. Orr: The details of "generic terms" and "descriptive terms," those are terms which have a significance in a legal way that a layman should not be required to understand.

The Court: We will have the reporter read the question.

(Question read.)

The Court: Overruled. If he knows, he may answer.

A. I am not prepared to answer that for the simple reason that I am not sure of my statement.

Q. You have read that decision, haven't you?

A. Well, no, I just took what Mr. Orr told me and let it go at that.

Mr. Mellin: May I read it into the record, your Honor? [149]

Mr. Orr: At this time I am going to object to it on the ground that it irrelevant and immaterial in this procedure; the words "Nursery Rhymes"

(Testimony of Allan L. Rowland.)

is not a mark that is involved in this proceeding.

Mr. Mellin: If your Honor please, this is very essential. He has called attention to this litigation. The reason for it is that this witness testified that the term "Nursery Rhymes" was synonymous with several terms, "Story Book," "Fairylend," and so on, as applied to dolls.

Mr. Orr: As applied to Storybook Dolls, yes.

Mr. Mellin: As applied to dolls. There is the decision of the Federal Patent Office which in effect, as we will show by these records, ruled that all of these trade-marks were invalid trade-marks because of descriptiveness and which is decided in the "Nursery Rhymes" case. This man, knowing that to be a fact, threatened our customers with suits on these trade-marks.

My point in showing that under an action of this sort for unfair competition is to show that those threats were made with some knowledge, at least, that their trade-marks were invalid, therefore were made maliciously. I think we are entitled to show the intent and the reason behind those threats to our customers.

We will show by this whole proceeding in litigation that reasonable men should know that these trade-marks here involved [150] are invalid trade-marks. That is shown by this witness' own suit that "Nursery Rhymes," "Storybook," and what have you are descriptive terms of nursery rhyme characters which the Patent Office held here; in fact, this defendant took an appeal from that very point that

(Testimony of Allan L. Rowland.)

it was not descriptive and was overruled, and the Court of Customs and Patent Appeals sustained the examiner in this case and sustained the commissioner in this case, that "Nursery Rhymes" was descriptive; in fact, in one place, said there is no proprietary interest of anyone in the names of nursery characters, and everyone should have the right to employ the nursery rhyme character names to dolls of their own conception. We want to show the malice and intent of the defendant behind these threats to our customers when that matter had already been decided in the Patent Office, and I think for that purpose I should be able to ask this witness if he didn't have notice of this ruling at the time when they sent those notices to our customers, by which we lost our customers.

Mr. Orr: Mr. Mellin ignores the fact that at the time this decision was rendered, there were other matters pending in this proceeding that went on appeal to the Court of Customs and Patent Appeals and I interpret the language of the decision to mean that the words "Nursery Rhymes" are not descriptive of dolls in general; that they are descriptive of the group of dolls that the Nancy Ann organization has made and sold, and that because the mark is descriptive of those, it would be [151] likely to cause confusion, and it refused the mark "Nursery Rhymes" to Ippolito, whose application was being passed on.

In another case involving Toyland, it was held

(Testimony of Allan L. Rowland.)

that Toyland was not descriptive, and it was allowed to be registered. Toyland was held not to be confusing and in that case the Patent Office was sustained and the word "Toyland" was allowed to be registered.

In the case of "Nursery Rhymes," they held that "Nursery Rhymes" was descriptive of goods made by Nancy Ann, although not descriptive of dolls in general, and they therefore sustained the decision of the Patent Office. It was expressly stated in their decision that the mark is not descriptive of dolls in general.

Mr. Mellin: May I read the Court just one paragraph in that case? I am reading the decision of the United States Court of Customs and Patent Appeals—that is the decision I was referring to:

"The examiner further rejected the registration *ex parte* for the stated reason that the mark would be understood by the purchasing public as referring to any and all reproductions of fictional characters from 'Nursery Rhymes' as a class. He held that every producer of dolls had the right freely to make and sell his conception of 'Nursery Rhyme' characters familiar to everyone from childhood days and that the common right to make any article is [152] inseparable from the right to use words which aptly describe it. He has therefore held that the descriptiveness clause of Section 5 of the involved Act was deemed

(Testimony of Allan L. Rowland.)

to constitute a bar to the registration of appellant's mark.

"On appeal the commissioner sustained all of the reasoning advanced by the examiner of interferences.

"We are of opinion that the decision of the commissioner is without error."

Now, what I wanted to do, your Honor, is to show that this witness had knowledge that the examiner of interferences in the Patent Office in this proceeding held that "Nursery Rhymes" was descriptive in such terms that would indicate to any reasonable person that all these marks were descriptive and invalid, and then to ask the witness if he had knowledge of that decision prior to sending these letters. Then I am through. I am not asking him to interpret it. I will eventually question him as to whether he had knowledge of this decision prior to that time.

Mr. Orr: May I also read into the record a further statement or decision of the Court of Customs and Patent Appeals in this nursery rhymes case?

Mr. Mellin: You have a certified copy of that decision?

Mr. Orr: I have a certified copy of that decision in my hand. At the bottom of page 5 it says:

"While we do not consider the mark 'Nursery Rhymes' [153] descriptive of dolls generally, we do consider it highly suggestive of a class of dolls in particular.

(Testimony of Allan L. Rowland.)

“The suggested mark ‘Nursery Rhymes’ is generic to the specific marks registered to appellee, each of which is individually suggestive of a segment of the group of which appellant’s suggested mark is suggestive. It is apodictic, in our opinion, that confusion as to the origin of the goods of the parties would follow if registration were granted to appellant.”

Q. (By Mr. Mellin): Were you aware of it at the time it was handed down, that decision of the Commissioner of Patents, and of the Examiner of Interferences in the Patent Office in this Ippolito matter we have been discussing, which is Proceeding No. 24874?

A. Well, I was not fully aware of all the details; I left it up to counsel.

Q. At the time these notices were sent to Macy’s and the other customers of the plaintiff, you and your counsel both were aware of the decisions we have just been referring to, were you not?

A. Well, yes, we were both aware of them.

Q. And you used the same counsel——

A. But as far as I am concerned, the actual detail, I was not particularly aware of that.

Q. I am not asking that, Mr. Rowland.

A. Okay. [154]

Q. And you used the same counsel, that is, the firm of Charles Evans, both in the Ippolito proceeding and in the matter of the notification of the customers in this instance?

A. Yes, sir, that is correct.

Mr. Mellin: No more questions, Mr. Rowland.

The Court: Are you through with this witness?

Mr. Orr: I will reserve my examination until later.

The Court: Very well.

Mr. Mellin: You may be excused as far as I am concerned.

I have here a certified copy; there are some sections of it I should like to read into the record as statements against interest, and I should also like to introduce it for the purpose of showing a certified copy of the decision of the Examiner in the Interference that was noticed in this proceeding. This has a bearing on the instant case.

And then I should like to offer a certified copy of the decision of the Court of Customs and Patent Appeals.

The Court: Very well.

Mr. Mellin: Is it your Honor's wish that I merely offer it all and then read to the Court the pertinent parts in all argument or quote them in the brief, or does the Court wish that we read them into the record now?

The Court: Make a record of them now.

(Certified copy of file wrapper in Opposition No. 2487 for *Nancy Ann Dressed Dolls v. Ippolito* was thereupon marked [155] Plaintiff's Exhibit No. 55 in evidence.)

Mr. Mellin: I will now refer to page 5 of the Notice of Opposition which was verified by Mr.

Allan L. Rowland, the witness, and I read from page 5 of that document:

“Applicant’s mark ‘Nursery Rhymes’ is substantially indetical in psychological derivation and effect with Opposer’s trade-marks ‘Storybook,’ ‘Mother Goose,’ and other marks derived from the nursery rhymes as above noted, and is confusingly similar thereto in connotation and suggestion; that applicant’s said mark is a generic term applicable to the nursery rhyme names, characters and expressions used by Opposer upon its doll products as above set forth; and that concurrent use of Applicant’s mark, ‘Nursery Rhymes,’ and Opposer’s above-listed marks upon substantially identical goods will confuse the trade and the purchasing public.”

I am now reading from Mr. Rowland’s cross-examination by Mr. Naylor on page 111 in pencil at the bottom of that exhibit 55 for identification:

“XQ. 122. I understood you to say, Mr. Rowland, that the term ‘Storybook Dolls’ covers all of the nursery rhymes; was that your answer?

“A. No. I said when we selected the title of ‘Storybook Dolls,’ it was our opinion that it covered nursery rhymes, fairy tales, fairyland, ‘Mother Goose,’ and all other items [156] of that nature.

“XQ. 123. In other words, it embraces the whole of the children’s literature, does it not?

"A. In our opinion, it does.

"XQ. 124. So that the position as taken is that no other manufacturer of dolls may use any word which appears in children's literature, is that correct?

"A. No, sir, only those for which we have trade-marks."

I am now going to read from the Opposer's brief on the final hearing. It is on page—let's skip that one—from page 5 of the brief or page 161 of the document.

"From the outset Nancy Ann Abbott has selected as the subjects and names for her dolls characters which have been known to and loved by little children for generations. For the most part, the dolls embody Miss Abbott's conception of characters from 'Mother Goose' and the 'Nursery Rhymes' and from fairy tales and other children's stories. In Miss Abbott's personality there has been coupled with the interest in and love of the characters of childhood fantasy, common to little girls in general, an artistic and creative talent which has enabled her to create beautiful little dolls portraying those characters in a way that has appealed to little girls (including grown-up little girls) throughout the country."

Now, continuing to read from that: [157]

"Her dolls have been marked and sold with labels bearing as trade-marks the names of many of 'Mother Goose,' nursery rhyme, fairy

tale and other story-book characters and have gained nation-wide and international recognition under those marks and labels, as the products of Miss Abbott's organizations. Her dolls have supplied to little girls (of all ages) an outlet for the collector instinct which in little boys (young and old) is directed to collecting marbles, match covers, stamps, coins and other objects, with or without value. Little girls instinctively mother their dolls; and, once a family of dolls is started, the owner strives to add to it until she is surrounded by all her playmates from the make-believe realms of the nursery rhymes, fairy tales and story books."

I will read from the brief for the Opposer-Appellee to the Commissioner of Patents, and that party was the Nancy Ann Dressed Dolls in that same Opposition.

"Secondly, the Examiner of Interferences took up and decided as an ex parte matter that the designation 'Nursery Rhymes' is unregistrable as a trade-mark because of descriptiveness. On that point the Examiner ruled that the mark is descriptive of the doll products for which registration was sought, and hence that the applicant is not entitled to register the mark."

I should like to read into the record the decision of the [158] Examiner in Interference:

"This is an opposition in which only the Opposer has filed testimony and both parties

have filed briefs and were represented at the hearing.

“The mark disclosed in the applicant’s application consists of the notation ‘Nursery Rhymes’ and is used upon dolls.

“The Opposer is engaged in the sale of the same kind of goods under the names of various characters found in children’s literature as well as in connection with excerpts or paraphrases of the texts relating to such characters obtained in the books from which the names were derived. Many of the dolls of Opposer’s manufacture were inspired by nursery rhymes, and it is upon this line of dolls that its right of action in this case is essentially predicated. As stated in the Notice of Opposition, the notation, ‘Nursery Rhymes,’ sought to be registered is a ‘generic term applicable to the nursery rhyme names, characters and expressions used by Opposer upon its doll products’; and by reason thereof, it is in effect further averred that the applicant’s mark cannot serve to identify its goods to the exclusion of the like products of the Opposer, and that its use by applicant as a trade-mark consequently is calculated to cause confusion in the trade.

“The party Nancy Ann Storybook Dolls, Inc., which [159] has been permitted to intervene herein as assignee of the original Opposer, through its assignor and other predecessors in business has been engaged in the manufacture of dolls since many years prior to the earliest

date claimed by the applicant. This business, which was founded in 1935 by the Opposer's witness Abbott and has been carried on through successive partnership and corporate organizations with which she since has been actively associated, has been based largely on the idea of designing dolls embodying Miss Abbott's conception of characters from Mother Goose and other nursery rhymes and story books generally familiar to everyone. The goods produced by the Opposer, which now amount to approximately 5,000 items per day, comprise a long list of characters (Exhibits 3, 6, 7 and 8), inclusive, of numerous dolls of distinctive forms and costumes specially designed to represent such nursery rhyme personalities as 'Little Miss Muffett,' 'Jack and Jill,' and the like. These dolls are listed in Opposer's catalogues by the names of the characters which they are designed to depict, and each doll is identified by a wristlet label bearing the appropriate name (Exhibit 1). Also, the boxes in which they are sold are provided with labels (Exhibit 2) containing excerpts or slightly modified selections from the nursery rhymes from which the names were respectively taken. [160]

"It fails to appear that the expression 'Nursery Rhymes' sought to be registered has ever been used by the Opposer's organization other than orally. Nevertheless, this expression is generically descriptive of the entire line of dolls sold by the Opposer under the names of nur-

sery rhyme characters. The Opposer and its customers, therefore, are entitled to use the designation 'Nursery Rhymes' to identify this line of goods; and it seems clear that its exclusive use by the applicant as a trade-mark inevitably would lead to confusion and deception of purchasers, to the injury of the Opposer. Under such circumstances it is immaterial here whether or not the Opposer heretofore has had occasion to make use thereof in any form."

Accordingly, the Notice of Opposition is hereby sustained.

"There remains 'to determine ex parte, and without reference to the issues raised by the Notice of Opposition,' the question of registrability of the applicant's mark.

"In the case of Virginia Dare Extract Co., Inc., v. Gray, 51 U.S.P.Q., 228, an opposition proceeding involving an application for the trade-mark 'Virginia Dare' for dolls, the Commissioner refused registration to the applicant ex parte, for the reason that such goods comprehended dolls purportedly fashioned after the likeness of the historical character of that name and hence that the mark is 'descriptive' and publici [161] juris. Likewise, in the recent case of ex parte Nancy Ann Dressed Dolls, 74 U.S.P.Q. 270, registration of 'In Powder and Crinoline,' for dolls, was refused on the grounds that it is descriptive of dolls dressed in the Colonial attire thereby indicated. In the present case the mark 'Nursery Rhymes' sought to

be registered is of even broader scope, since it would be understood by the purchasing public as referring to any and all of the fictional characters of nursery rhymes as a class.

“Certainly every producer of dolls is entitled freely to make and sell his conception of nursery rhyme characters familiar to all from childhood. And it is fundamental that the common right to make any article is inseparable from the right to employ words which aptly describe it. (Citing cases.)

“The descriptiveness clause of Section 5 of the Act is accordingly deemed to constitute a bar to the registration sought by the applicant.

“For the reasons indicated, it is further adjudged that the applicant is not entitled to the registration for which he has made application.”

I now wish to read into the record a decision of the Commissioner of Patents on the appeal from the Examiner of Interferences in that same proceeding.

After giving the title and name of the cause:

“The Examiner of Interferences has sustained [162] opposition to an application, Serial No. 481227, to register a trade-mark comprising the words ‘Nursery Rhymes’ under the Trade-Mark Act of 1905, as a trade-mark for ‘dolls,’ and applicant appeals.

“The Notice of Opposition sets out as a basis for Opposer’s right to oppose in the above-

entitled proceeding, its sale, since long prior to any date claimed by applicant, of dolls 'with names, characters and jingles derived from the nursery rhymes and child story books familiar to children throughout the United States, * * *' and that it has applied to said dolls and their packages 'labels bearing the names of nursery rhyme and story book characters and/or extracts from nursery rhymes relating thereto.' As illustrative of this, paragraph No. 1 of the Notice of Opposition recites thirty-six names so used, of which 'Little Boy Blue,' 'Little Red Riding Hood,' 'Little Miss Muffett,' 'Jack,' 'Jill,' and 'Little Bo-Peep' are regarded as typical. The Notice also recites a number of registrations of such names under the Trade-Mark Act of 1905 by Opposer, and alleges that applicant's mark 'Nursery Rhymes' simulates or suggests such trade-marks to an extent that it is likely to cause confusion in trade and mistake in the mind of the purchasing public. It also sets up ownership and use of both 'Storybook' and 'Mother Goose' as trade-marks and alleges that 'applicant's said mark is a generic term [163] applicable to the nursery rhyme names, characters and expressions used by Opposer upon its doll products.' There is also reference to common 'psychological derivation' between Opposer's said mark and that which applicant seeks to register.

"The Notice of Opposition therefore appears to be based upon the confusion in trade clause

of Section 5 of the Trade-Mark Act of 1905, and upon the alleged descriptive or generic nature of applicant's mark. The Examiner of Interferences in sustaining the Notice of Opposition referred specifically to the allegations that the mark sought to be registered 'is a generic term' for such products and that 'it cannot serve to identify its goods to the exclusion of the like products of the Opposer.' The Examiner found that Opposer has proved use of its marks referred to since prior to any date claimed by applicant, and that Opposer's business is based largely on dolls designed to embody the Opposer's president's conception of characters from nursery rhymes and similar sources. Opposer's sale methods included affixing a wrist label bearing the name to each doll, and each of the boxes in which the dolls are packed contains an excerpt from the corresponding nursery rhyme. Opposer's testimony, particularly that of the department store buyers, makes clear that Opposer and others have sold dolls designed to depict [164] characters in nursery rhymes and similar literature, and that character dolls purporting to represent different characters of literature, history or nationality have been widely known and sold. While none of Opposer's marks as such appear to resemble 'nursery rhymes' either in sound, appearance or meaning, it is my opinion that the Examiner of Interferences correctly found as alleged by Opposer that the expression

‘Nursery Rhymes’ is a descriptive or generic designation of an entire line of dolls sold by Opposer, and that Opposer and its customers are entitled to use of such descriptive designation to identify this line of goods even though any use of the term in connection therewith has been oral and they have never applied it to their goods.” (Citing cases.)

“In addition to finding that Opposer was entitled to maintain its opposition for the foregoing reasons, the Examiner of Interferences proceeded *ex parte* to consider applicant’s mark and to refuse it on the ground of its descriptiveness. This *ex parte* holding is challenged, it being contended that the words are not descriptive of the goods and that neither the Examiner of Interferences nor this Office on appealing has authority to make such *ex parte* ruling in such a matter.

“As to the right of the Examiner to consider this *ex parte* issue with reference to applicant’s mark, there [165] can be no question but that it is not only the Examiner’s right but his duty to consider this in an appropriate case.” (Citing cases.)

“It is contended on this appeal that this authority does not in any event extend to a case in which the opposition is sustained, but only where it is dismissed.” (Citing cases.) “The latter case has been since the hearing in this matter been reversed on May 28, 1948, by the United States Court of Appeals (No. 9574).

Neither case is, however, believed to justify such a contention, but if any doubt existed it appears to have been settled by the decision in *Columbia Broadcasting System, Inc., v. Technicolor Motion Pictures Corporation*, *supra*, in which the court based its decision on the point of descriptiveness, stating that it was not necessary to pass upon the correctness of the Patent Office ruling sustaining the opposition on the basis of the *inter partes* question there involved. It is therefore clear that it was not only the Examiner's right but his duty to determine this point without reference to the issues of the opposition proceeding so that an apparent *prima facie* exclusive right to such descriptive term might not be granted to applicant in the event of any disagreement with the holding as to opposer's rights to sustain the opposition.

"As to the correctness of the holding that the term is [166] descriptive, there can be little question. As to this the Examiner stated:

" 'Every producer of dolls is entitled freely to make and sell his conception of nursery rhyme characters familiar to all from childhood. And it is fundamental that the common right to make any article is inseparable from the right to employ words which aptly describe it.' " (Citing cases.) " 'The descriptiveness, clause of Section 5 of the Act is accordingly deemed to constitute a bar to the registration sought by the applicant.' "

“That ‘Nursery Rhymes’ is aptly descriptive of character dolls which fall within the group of characters identified by nursery rhymes hardly requires argument.” (Citing cases.)

“The decision of the Examiner of Interferences is affirmed.”

I offer the document from which I read in evidence as Plaintiff’s Exhibit 55.

Mr. Orr: At this time I move to strike the exhibit and I move to strike all extracts which have been read into the record on the ground that they are wholly irrelevant and immaterial, having no evidentiary value whatsoever in this case.

The Court: Indicate for the record the purpose of the offer. [167]

Mr. Mellin: The purpose of the offer—I read from this record statements which are attributable to the defendant as to the descriptiveness of names.

Mr. Orr: They are utterly argumentative and have no bearing on any of the marks involved in this. “Nursery Rhymes” is not involved.

Mr. Mellin: If your Honor please, the witness stated that “Nursery Rhymes” are synonymous with “Storybook,” “Fairyland” and the others.

The Court: I will deny the motion to strike. It may or may not become material.

Mr. Mellin: I have here for the Court’s convenience a certified copy of the decision of the United States Court of Customs and Patent Appeals which is not in print. I should like to offer it for the record in evidence.

Mr. Orr: Certainly decisions of the Court of Customs and Patent Appeals should go in.

The Court: Have you got a copy of it?

Mr. Orr: Yes, I have a copy.

The Court: It may be admitted and marked.

The Clerk: 57 in evidence.

(The certified copy of decision referred to was thereupon marked Plaintiff's Exhibit No. 57 in evidence.)

Mr. Mellin: That will conclude the plaintiff's opening case, your Honor. [168]

Mr. Orr: May we begin our case after the recess at noon?

The Court: Very well. We will take an adjournment until 2:00.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [168-A]

August 22, 1950, 2:00 P.M.

ALLAN L. ROWLAND

recalled for the defendant; previously sworn.

Direct Examination

(Continued)

By Mr. Orr:

Q. Will you state again, Mr. Rowland, your connection with the defendant in this action, Nancy Ann Storybook Dolls?

A. Secretary and treasurer.

Q. How long have you been actively connected

(Testimony of Allan L. Rowland.)

with Nancy Ann Storybook Dolls, Inc., and its predecessors? A. Since its inception in 1937.

Q. Will you state briefly the beginnings of the organization that has developed into the Nancy Ann Storybook Dolls, Inc.?

A. Well, we started in February, 1937, and it was solely Nancy Ann's idea of the creation of these characters.

Q. Going back of the forming of the original corporation, can you give me a little of the background or how the line of dolls was originated in the first place—the idea was originated?

A. Yes, the idea was originated by Nancy Ann Abbott.

Q. How did you become interested in the project?

A. Well, I met Nancy through mutual friends and became interested in the business, and we borrowed money to start the thing; we borrowed \$500 to start the business.

Q. And what was really the very beginnings of the business? [169] Nancy Ann had not made dolls herself?

A. Nancy Ann was making dolls herself in a small circulating library on Sutter Street, was selling them to her friends, and she sold about 450 to the Metropolitan store managers one Christmas. All the girls became so entranced with them that they brought back a whole load of orders, more or less started her going on it.

Q. When you became interested, what steps did

(Testimony of Allan L. Rowland.)

you take toward putting it into a commercial enterprise?

A. Well, we hired salesmen and started to manufacture dolls in a very small manner.

Q. Was that before or after the corporation was formed?

A. That was after the corporation was formed.

Q. The corporation was formed in 1937?

A. November, 1937, yes, sir.

Q. What was your position at that time?

A. Well, most everything.

Q. I mean, in general, what was your occupation at the time you became interested in——

A. I was an auditor for the State Corporation Department.

Q. How long did you continue business as the initial corporation, the Nancy Ann Dressed Dolls, Inc.?

A. Until 1942. At that time we changed to a partnership and early in '46 it was back to a corporation again.

Q. How did the ownership interest in the partnership compare [170] with the ownership interests in the initial corporation?

A. Identical at all times.

Q. Who were the incorporators, those of interest in the original corporation?

A. Nancy Ann Abbott and Fred Anderson and myself.

Q. Were those interests preserved in the same ratio in the partnership?

(Testimony of Allan L. Rowland.)

A. Yes, sir, they were.

Q. And in the transfer from the partnership to the present corporation Nancy Ann Storybook Dolls, Inc., when did you say that occurred?

A. In the early part of 1946.

Q. And did the partnership interests remain the same? A. Identical.

Q. You say that you started out in your production on rather a small scale. And by a small scale, what would you estimate the number of dolls per day or per week? A. Well——

Q. To start with.

A. It is a pretty long time, but we were making probably four or five dozen dolls a week at the very beginning.

Q. And you have been in production continuously since that time? A. Yes, sir.

Q. What did you do in the matter of appropriating names or [171] trade-marks for your products in the early days of your organization?

A. Well, we started out with the name Nancy Ann on the dolls, and at that time we found out there was another Nancy Ann doll on the market, so after advice of counsel, we backed away from that and we made a very thorough search of the records and found out that "Storybook" was not being used and at that time we adopted the name, or we registered the name "Storybook Dolls" as our trade-mark.

Q. Prior to the time you had adopted the mark

(Testimony of Allan L. Rowland.)

“Storybook,” had you applied marks of any kind to individual dolls that had been marketed?

A. I believe we did, yes, sir.

Q. Could you recall what some of those names were?

A. Some of the early ones were “Red Riding Hood” and “Bo-Peep” and “Mistress Mary,” and how many more I can’t say offhand.

Q. And at that time did you make a check of the marks to determine whether or not the names that you were using were in use by others?

A. Yes, sir, we made a check of the marks to find out if any dolls were being used with those names, and at the time we applied for the registration, there was nobody using those particular names on any dolls.

Q. In this case there are involved a number of marks, including the marks “Red Riding Hood,” “Little Miss Muffett,” “Little [172] Bo-Peep,” “Mistress Mary,” “Little Miss Donnett,” “Curly Locks,” “Goldilocks,” “Sugar and Spice,” “Storybook,” “Fairylane Dolls” and “Story.” Will you state whether or not the Nancy Ann Storybook Dolls, Inc., is the owner of the trade-marks which I have just enumerated? A. They are.

Q. And can you state whether or not those marks have been registered? A. Yes, they have.

Q. I will direct your attention to a booklet containing registrations of the marks I have enumerated and ask if you recognize those as copies of the

(Testimony of Allan L. Rowland.)

registrations which have been granted to your company or its predecessors.

Mr. Mellin: If your Honor please, that would be just a complete duplication in the record of what we have offered.

Mr. Orr: It will be a duplication, but in a convenient form, and I think perhaps the Court will accept it as an exhibit.

A. Yes, they are all——

The Court: Let me see. You may proceed.

A. Yes, they are all marks that have been registered by us.

Mr. Orr: I would like at this time to offer the booklet just identified by the witness as a booklet containing the registrations here involved.

The Court: It may be admitted and marked.

The Clerk: Defendant's Exhibit B. [173]

(The booklet referred to was thereupon marked Defendant's Exhibit B in evidence.)

Mr. Orr: This could be marked B with the individual registrations indicated, I suppose, 1 to 11 in the order in which they appear in the book.

Q. Now, some of those marks have been issued to the initial corporation, perhaps others to the partnership or the later corporation. Have assignments been duly made and recorded with respect to the ownership of these registrations?

A. They have.

Q. They have the original assignments?

A. Yes, sir, I have.

(Testimony of Allan L. Rowland.)

Q. I direct your attention to a photostat copy of an assignment which on its face indicates that it has been recorded in the Patent Office Liber C-196, page 532, and ask you if you recognize what that instrument is?

A. That is an assignment on the Nancy Ann Dressed Doll Corporation to the partnership.

Mr. Orr: I will offer the photostat copy of the assignment just identified by the witness as Defendant's exhibit next in order.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit C in evidence.

(The assignment referred to was thereupon marked Defendant's Exhibit C in [174] evidence.)

Q. (By Mr. Orr): You have also produced for me a photostat copy of an assignment, or, rather, you have produced the original of an assignment which shows on its face that it has been recorded in Liber R-205, page 442 of the Patent Office, and ask if that is one of the assignments which you have referred to? A. It is.

Q. I will present you a photostat copy and ask if that is a copy of that instrument you have just identified as the original? A. It is.

Q. I note that the Liber number and page number do not appear on the photostat copy. Is that because the photostat was made before the instrument was recorded? A. That I couldn't say.

Mr. Orr: I will offer the photostat copy of the

(Testimony of Allan L. Rowland.)

assignment just identified by the witness and ask that it be marked Exhibit C-1.

The Court: It may be admitted and marked.

The Clerk: Defendant's Exhibit C-1 in evidence.

(Photostatic copy of assignment referred to was thereupon marked Defendant's Exhibit C-1 in evidence.)

Q. (By Mr. Orr): Beginning with the small production which you say you began with back in 1937, what can you say as to the growth of your company and the expansion of its production? [175]

A. Well, from 1937 to the present day we have made about ten million dolls.

Q. And that sale has been continuous over the period from 1937 to the present time?

A. Yes, sir, it has.

Q. Over what territory do you sell those dolls?

A. Well, practically all over the world and all the United States and Canada, England, South Africa, the Philippines, Occupied Japan.

Q. In general, what has been the policy with respect to the type of distributor to whom you sold your dolls?

A. I didn't hear the first part of your question.

Mr. Orr: Read the question, please.

(The reporter read the question.)

A. Practically all our sales have been to department stores and some gift shops.

The Court: Are you familiar with your market in England on these dolls?

(Testimony of Allan L. Rowland.)

A. Harridge's—we were selling them to Harridge's.

Q. One individual?

A. Yes, the only store we had.

Q. Approximately how many have you sold?

A. In the last couple of years we haven't been able to sell on account of the devaluation of the pound sterling. They had a certain limited amount but now it is questionable. We were [176] selling about a thousand dollars a year to them.

Q. I will direct your attention to a group of records which have been produced by your organization in various proceedings in the past and ask if you recognize what they are.

A. Yes, sir, they are our invoices covering the sale of merchandise for the various stores.

Q. And do you recall the reason for turning those records over to your counsel?

A. For the purpose of establishing identification and use of certain marks.

Q. And are those typical of your records of sales of dolls during the early days of your organization?

A. Yes, sir.

Q. And they are records that were taken from your regular files?

A. Yes, sir.

Q. For the purpose of use as testimony?

A. Yes, sir.

Q. In connection with your testimony?

A. Yes, sir.

Mr. Orr: I would like to offer the group just

(Testimony of Allan L. Rowland.)

referred to as Defendant's Exhibit D, Exhibit D being——

The Court: Do you want to make them all one exhibit?

Mr. Orr: Make them D but with successive numbers.

The Court: Very well. [177]

Mr. Orr: So that the group will appear as Exhibit D with the suffixes, Exhibit D being an invoice sold J. L. Hudson Company, Detroit, Michigan, under date of 6/17/36;

As D-1 an invoice of the Nancy Ann Dressed Dolls to the Toy Shop, Inc., 1329 Fifth Avenue, Seattle, Washington, date 8/6/36;

An invoice to S. S. Weisman, 617 Texas Street, Shreveport, Louisiana, date 8/28/36 as D-2;

As D-3 an invoice of Nancy Ann Dressed Dolls to J. K. Gill Company, Portland, Oregon, date 9/1/36;

As D-4 an invoice of Nancy Ann Dressed Dolls to L. Bamberger & Company, Newark, New Jersey, date 11/9/36;

As D-5 an invoice of Nancy Ann Dressed Dolls, Inc., to Fred Harvey, Union Station, Kansas City, Missouri, date 3/21/38;

Next an invoice of Nancy Ann Dressed Dolls, Inc., to Cash Wholesale Company in Little Rock, Arkansas, date 4/16/40, (D-6).

Next an invoice from Nancy Ann Dressed Dolls, Inc., to Carl's, San Antonio, Texas, date May 28, 1941, (D-7);

(Testimony of Allan L. Rowland.)

Next an invoice, Nancy Ann Dressed Dolls, Inc., to Miller & Paine, Inc., Lincoln, Nebraska, date August 12, 1941, (D-8);

Next an invoice, Nancy Ann Dressed Dolls, Inc., to Loveman, Joseph & Loeb, Birmingham, Alabama, date August 15, 1941, (D-9);

Next an invoice of Nancy Ann Dressed Dolls, Inc., to Younker Bros., Inc., Des Moines, Iowa, date March 17, 1942, (D-10);

Next an invoice, Nancy Ann Dressed Dolls, Inc., to Milwaukee [178] Boston Store, date March 17, 1942 (D-11);

Next an invoice, Nancy Ann Dressed Dolls, Inc., to H. C. Capwell Company, Oakland, California, date October 29, 1942, (D-12);

Next an invoice of Nancy Ann Dressed Dolls to Logan's Sports Wear, Logan, Utah, date June 11, 1943, (D-13);

Next an invoice to the Paris Company, Salt Lake City, Utah, date August 30, 1943, (D-14);

Next an invoice to F. A. O. Schwarz, 745 Fifth Avenue, New York, New York, date April 17, 1944, (D-15);

Next an invoice from Nancy Ann Dressed Dolls to Wieboldt Stores, Inc., Oak Park, Illinois, date May 12, 1944, (D-17);

An invoice, Nancy Ann Dressed Dolls, Inc., to The Dayton Company, Minneapolis, Minnesota, date March 16, 1942, (D-18);

An invoice, Nancy Ann Dressed Dolls, Inc., to

(Testimony of Allan L. Rowland.)

Halliburtons, Oklahoma City, Oklahoma, date February 27, 1942, (D-19) ;

Next an invoice, Nancy Ann Dressed Dolls to the Higbee Company, Cleveland, Ohio, date January 17, 1945, (D-20) ;

Next an invoice to The Emporium, San Francisco, date January 31, 1945, (D-21) ;

And finally an invoice from Kaufmann's Fifth Avenue, Pittsburgh, Pennsylvania, date May 23, 1945, (D-22) ;

(The invoices were marked respectively as indicated, in evidence.)

Q. (By Mr. Orr): I will hand you one of the invoices just [179] identified as Defendant's Exhibit D-9, and call your attention to the fact that it comprises several sheets. Will you explain, briefly, what those several sheets are?

A. The first sheet is the office copy of invoice, bearing the date and the address, order number, department number, and the salesman and the commodity which was shipped.

The second one is the Railway Express receipt, signed receipt, indicating it was picked up by Railway Express on the same day, shipped to the customer.

The third piece of paper is the factory copy which is marked by the shipping clerk showing how it was shipped, the date it was shipped, and the number of cartons.

The last two pages are merely the worksheet of the original order—our worksheet.

Q. Is that arrangement and grouping of sheets

(Testimony of Allan L. Rowland.)

common to the several invoices and groups of papers that we have introduced here?

A. Yes, sir.

Q. That is in accordance with your general practice? A. Yes.

Q. Is there anything by which the shipping receipts and factory number orders are coordinated with the top sheet so that they know that it all relates to the same transaction?

A. Yes, the invoice number is on the edge of both the office copy and the factory copy; it is written on the bill of lading, [180] and there is nothing on the worksheet to indicate it.

Q. But as to each of these transactions, then the presence of a shipping receipt and your factory copy indicate that the goods have been shipped?

A. Yes, sir.

Q. I ask you to produce for me a group of records indicating typical sales of your organization during the past few years as indicating the quantity and the wide territory which you have, the quantity that you have sold, and the territory that you have shipped them to. Will you identify the group that I have just handed you?

A. Yes, sir.

Q. What are they?

A. They are invoices to the various stores throughout the United States. This happens to be a group of various dates but all being the same amount in dollars and cents due to the fact that these were printed rather than being typed. In

(Testimony of Allan L. Rowland.)

other words, the invoices were printed ahead of time and when we ship anybody two units or five units or 36 units, the invoices were printed ahead of time to save the billing expenses and time.

Q. Will you explain, briefly, what that unit system billing orders is?

A. The unit came about during the war when we only had a limited amount of merchandise. Rather than give all of one [181] number to one store, we decided the best thing to do was to make an equal distribution. So, therefore, we organized the unit, which comprised at that time, I believe, about 75 dolls, and we sold the merchandise in a unit packed at \$75 for around 70 dolls, and these invoices happen to be all of the 36 unit pack.

Q. And you had printed up invoices for different numbers of units per sale?

A. Yes. This happened to be the highest one of the ones we had for convenience in shipping.

Q. These are records you have taken from the records of your company?

A. Yes.

Q. Will you explain whether you have attached to these shipping and factory records that correspond?

A. They should be complete. They are. There are some cancelled ones in there, too, but as a whole, they are complete with the bills of lading and the office copy.

Mr. Orr: I will offer in evidence the group of invoices and attached papers just identified by the witness, and ask that they be identified as Defend-

(Testimony of Allan L. Rowland.)

ant's Exhibit E, with the invoices numbered successively from E, E-1, E-2 through, and I would like to identify them on the record.

The Court: Why can't the last offer be admitted as one exhibit? [182]

Mr. Orr: As one exhibit, as Exhibit E, the exhibit comprising invoices to the following individuals.

The Witness: Mr. Orr, that isn't a shipment, that top one; that is an order.

Mr. Orr: William Filene's Sons & Co., Boston, Massachusetts, dated October 29, 1947;

An order to The Dayton Company, Minneapolis, Minnesota, dated October 24, 1947;

An invoice to Bullock's, Broadway and Hill and 7th Streets, Los Angeles, October 23, 1947;

Invoice to the Broadway Department Store, Los Angeles, dated October 22, 1947;

Invoice to Famous-Barr Company, St. Louis, Missouri, no date, invoice No. 87225;

Invoice to The Paris Company Department Store, Salt Lake City, Utah, no date, invoice No. 87224;

Invoice to Famous-Barr Company, St. Louis, Missouri, date September 30, 1947; invoice No. 87223;

Invoice to The Dayton Company, Minneapolis, Minnesota, date October 8, 1947, invoice 87222;

Invoice to the Famous-Barr Company, St. Louis, Missouri, date September 3, 1947;

Invoice to Marshall Field & Company, date September 5, 1947, invoice 87220;

(Testimony of Allan L. Rowland.)

Invoice to Jordan Marsh Company, Boston, Massachusetts, [183] date September 4, 1947, invoice No. 87219;

Invoice to Milwaukee Boston Store, Inc., date August 29, 1947, invoice No. 87218;

Invoice to Kaufmann's, Fifth Avenue, Pittsburgh, Pennsylvania, dated August 18, 1947, invoice 87217;

Invoice to Wieboldt Stores, Inc., Oak Park, Illinois, dated August 11, 1947, invoice No. 87216;

Invoice to Wieboldt Stores, Evanston, Illinois, date August 20, 1947, invoice No. 87215;

Invoice to Wieboldt Stores, Inc., of Chicago, Illinois, 63rd and Green Streets, date August 12, 1947, invoice No. 87214;

Invoice to Wieboldt Stores, Inc., Lincoln School and Ashland Avenue, Chicago, date August 18, 1947, invoice No. 87213;

Invoice to The Halle Bros. Co., 1228 Euclid Avenue, Cleveland, date August 12, 1947, invoice No. 87212;

An invoice to The Dayton Company, Minneapolis, Minnesota, dated August 7, 1947, invoice No. 87211;

An invoice to Stix-Baer & Fuller Co., 603 Washington Avenue, St. Louis, Missouri, date August 7, 1947, invoice No. 87210;

Invoice to Marshall Field & Company, 121 North State Street, Chicago, date July 21, 1947, invoice No. 87209;

Invoice to Gimbel Bros., 33rd Street and Broad-

(Testimony of Allan L. Rowland.)

way, New York, New York, date July 25, 1947, invoice No. 87208; [184]

Invoice to Marshall Field & Company, 121 North State Street, Chicago, June 16, 1947, invoice No. 87207;

Invoice to Bullock's, Los Angeles, California, date June 6, 1947, invoice No. 87206;

Invoice to F. A. O. Schwarz, 745 Fifth Avenue, New York, New York, date May 29, 1947, invoice No. 87205;

Invoice to The Dayton Company, Minneapolis, Minnesota, date May 15, 1947, invoice No. 87204;

Invoice to Bullock's, Broadway, Hill and 7th, Los Angeles, date April 7, 1947, invoice No. 87203;

Invoice to Dennison Manufacturing Company, 411 Fifth Avenue, New York, New York, date April 10, 1947, invoice 87202;

And an invoice to Famous-Barr Company, Olive, Locust, 6th and 7th, St. Louis, Missouri, date April 11, 1948, invoice No. 87201.

The Clerk: The group is marked Defendant's Exhibit E in evidence.

(Group of invoices listed above was thereupon marked Defendant's Exhibit E in evidence.)

Q. (By Mr. Orr): That group of invoices, of course, does not begin to represent the total number that you have in your records? A. No, sir.

Q. I will hand you a slip of paper which you handed me with the group of documents and ask you if you can identify that. [185]

(Testimony of Allan L. Rowland.)

A. That is an order from the May Company of Los Angeles.

Q. Will you explain that?

A. Dated January 2, 1947, for 50,108 dolls. That is probably one of the largest doll orders placed in the United States.

Q. That was the Nancy Ann Storybook Doll?

A. Nancy Ann Dolls, for shipment as per the usual orders.

Q. What were the usual orders? What would they indicate by "usual orders"?

A. Their usual orders were about four to eight thousand dollars a week.

Mr. Orr: I will ask that the order slip just identified by the witness be placed in evidence as defendant's exhibit next in order.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit F in evidence.

(Order slip referred to was thereupon marked Defendant's Exhibit F in evidence.)

Q. (By Mr. Orr): Have you a tabulation of any kind that would give an approximation of the volume of sales which you have had during the period of the Nancy Ann organization?

A. Yes, sir, I have. I have it in dollars and cents, and a rough estimate indicates we have manufactured approximately ten million dollars since the inception in 1937.

Q. What is the tabulation that you have prepared?

A. \$8,744,384.97. [186]

(Testimony of Allan L. Rowland.)

Q. How was that tabulated? A. By years.

Q. By years?

A. Yes, sir, starting at \$16,000 for 1937, and then on up to 1949 there was a million and a half in sales.

The Court: In dollars?

A. Yes.

The Court: No wonder you looked so prosperous.

Q. (By Mr. Orr): Has the tabulation which you have prepared been made up from the figures taken from your official records? A. Yes, sir.

Q. And they truly represent the business done through these respective years? A. Yes.

Mr. Orr: I will ask that the tabulation which the witness has prepared and identified be introduced in evidence as Defendant's Exhibit G.

The Court: Let it be marked.

(The tabulation referred to was thereupon marked Defendant's Exhibit G, in evidence.)

The Court: You are familiar with your marketing problem. In all of these years have you marketed \$5,000 worth of your dolls in Europe?

A. In Europe?

Q. Yes. [187] A. No, sir.

Q. Did you market a thousand dollars' worth?

A. Yes, we could now.

Q. But did you?

A. No. In England we did around a thousand

(Testimony of Allan L. Rowland.)

dollars a year prior to the war years; Johannesburg, South Africa, we had about a thousand dollars.

The Court: You are getting off the beam. I was over this territory; I am anxious to know.

A. No, there is no demand for American dolls in Europe like there is in this country.

Q. Not at any time? A. Not most of it.

Q. At all? A. Probably by tourists.

The Court: They put us to shame here.

The Witness: Prior to the war.

The Court: I say that kindly.

The Witness: Prior to the war, the First World War.

The Court: I am talking about my own experience, recently. Everything over there is hand-made with a character and human touch that I never saw anything equal.

Mr. Orr: You should look over Nancy Ann dolls, your Honor.

The Court: I have seen Nancy Ann [188] dolls——

The Witness: We make ten thousand a day, Judge.

The Court: That is all right if you make ten million. That is the point I am making. I was wondering in my own mind, which has very little to do with the merits of this case, how you could go into a market of that kind, and make very much headway. You may go to South Africa and do it because it is off the beaten path, but every-

(Testimony of Allan L. Rowland.)

where in Europe they are so industrious when they are doing nothing else they are making dolls.

The Witness: Maybe we should move.

The Court: What is that?

The Witness: Maybe we should move.

The Court: I am very interested; I don't see how there would be a market for any.

The Witness: There was only a market in Har-ridge's in London.

The Court: The group I was with bought them in London and found they could do better there than anywhere else. Of course they had bought them in the States. Maybe that will help your business along. I am giving you the benefit of my opinion.

The Witness: Thank you.

Q. (By Mr. Orr): During the years you have been in this business, Mr. Rowland, has your organization issued price lists of the dolls which you have developed? A. Yes, sir, they have. [189]

The Court: Issued what?

Mr. Orr: Price lists.

The Court: Can't we get a stipulation on this line of testimony? I think it can be covered by stipulation; there is no question about that.

Mr. Mellin: I am not questioning it. In fact, to prove title we had already stipulated, so I let him go on.

Mr. Orr: I am doing this for two reasons; there is more than just the question of validity of trade-marks, there is the issue of unfair competition, and

(Testimony of Allan L. Rowland.)

there is the possibility that the question of secondary meaning may arise, and to sustain a ruling on the secondary meaning issue, it is necessary to have a showing of substantial use and long continued use. And I have gone to the trouble of putting in this long list of typical sales records to show that there have been extensive sales throughout the country since 1937.

The Court: That is simply answered by indicating you had done ten million dollars' worth of business.

Mr. Orr: It simply shows it in dollars and cents.

The Court: There isn't any question——

Mr. Mellin: Except to this extent; Only about ten per cent is attributable to the dolls involved here; the only 90 per cent is attributable to some other dolls, as is evidenced from the first invoice.

The Court: I understand; I mean the business on the whole. [190]

Mr. Mellin: On the whole, yes. It is only material as far as it extends to the dolls in issue.

Mr. Orr: If I may have the witness identify them as price lists which have been issued year by year by his company, then I will offer the entire group as one exhibit.

The Court: Very well.

The Witness: Yes. These are the price lists that have been issued from 1937 to the present one, 1950.

The Court: What are those?

A. Price lists.

(Testimony of Allan L. Rowland.)

The Court: Of what?

A. Of the "Storybook" dolls.

Mr. Orr: Listing the dolls, with the prices at which they are sold. Would your Honor care to look at the current one?

The Court: The purpose of this was not to give me the photograph of this young lady, was it?

Mr. Orr: That is secondary to its primary purpose.

The Court: That is all right.

Mr. Orr: I will ask that the group of price lists identified by the witness be placed in evidence as defendant's next in order with the 1937 price list given the primary letter H and the years following that numbered 1 on in order.

(Price lists referred to were thereupon marked Defendant's Exhibits H, H-1 to H-14, inclusive, respectively.)

The Court: May I inquire how many years ago this picture [191] was taken?

Miss Abbott: It was taken about, I think, less than a year ago.

The Court: You look like a young lady of 18.

Miss Abbott: Well, I photograph a little better than I look, sometimes known as photogenic.

Mr. Orr: I notice that there are two separate price lists for 1950. Can you explain that?

A. Yes, the first price list for 1950 were dolls with opened eyes; since that time we have brought out sleeping-eye dolls.

(Testimony of Allan L. Rowland.)

The Court: How long have they been on the market?

A. We brought them out at the Fair, the Toy Fair in March.

Q. March of this year? A. Yes, sir.

The Court: They have them over in Europe. I brought one of them back.

Miss Abbott: Germany had them for some years, small dolls.

The Court: I will bring you up to date on dolls. I brought one back with me.

Mr. Orr: Did they bear trade-marks resembling those of Nancy Ann?

The Court: I didn't pay any attention to that part of it.

Mr. Orr: That is the important thing we are concerned with.

The Court: Moving eyes. In fact, my youngster that I [192] brought it back for didn't discover it for quite a while. We had it half an hour and we discovered it in half an hour that the eyes were moving.

Mr. Orr: I am about to go into a different line of interrogation.

The Court: That indicates to me clearly that you would like to have a recess.

Mr. Orr: I thought perhaps your Honor would like to take a short recess.

The Court: I will accommodate you. All right, we will take a recess.

(Recess.)

(Testimony of Allan L. Rowland.)

Q. (By Mr. Orr): Before the recess when we were discussing the tabulation of production figures which you had produced, I believe counsel made a statement that the total part involved here was only one-tenth of the number that would be represented on this statement. What can you say with regard to that statement?

A. That is so much in error; the whole thing represents "Storybook" dolls, the whole figure.

Q. "Storybook" dolls, all of them?

A. Yes.

Q. How about some of the others?

A. The others, about 50 or 60 per cent of them are nursery rhyme and fairy tale, and the rest—— [193]

Q. How about the fairy tale? Is that included in the 60 per cent? A. Yes.

Q. What can you say as to the sales of nursery rhyme and fairyland sales?

A. An actual tabulation would probably show that they are very much larger than the other dolls; in other words, fairy-tale and nursery-rhyme dolls and the Mother Goose series are the most popular; probably they sell about, on the Mother Goose series, they sell on the ratio of about 18 to 1.

Q. Have you done any extensive advertising during the period that you have been in business?

A. None whatsoever.

Q. Has any advertising been done in your behalf?

A. Yes, practically every store in the United

(Testimony of Allan L. Rowland.)

States, including Time Magazine and Glamor Magazine and a number of publications.

Q. Do you have any approximation of the amount of advertising that has been done in your behalf in the various stores?

A. That would have been impossible to estimate.

Q. (By Mr. Mellin): Did I hear you say that every store in the United States advertised it?

A. Practically, I said.

Q. Meaning department stores, I suppose, of the higher class? A. Yes. [194]

Q. (By Mr. Orr): I asked you to produce a few typical advertisements that have been used to advertise the Nancy Ann Storybook Dolls. Will you glance at the group that I have handed you and tell me what those are?

A. These are part of our clippings that we have been saving for a scrapbook at various times, the City of Paris ad. There are different ads all put on by the department stores.

Q. Those are actual clippings from newspaper publications throughout the country?

A. Yes, sir, the name of the newspaper is on top, and the date. We have a special girl doing nothing but that all the time.

Mr. Orr: I will ask that the group of advertising clippings identified by the witness be entered in evidence as Defendant's Exhibit I with the individual ads not given numerical suffixes.

The Court: It may be admitted and marked.

The Clerk: Defendant's Exhibit I.

(Testimony of Allan L. Rowland.)

(Newspaper clippings were thereupon marked Defendant's Exhibit I in evidence.)

Q. (By Mr. Orr): Has that practice of making clippings and preserving advertisements of "Story-book" dolls been continued through the years?

A. Yes, sir, it has.

Q. During the course of some of these opposition and Patent [195] Office proceedings, have you been asked to produce typical clippings from time to time?

A. Yes, sir.

Q. I will hand you a folder of clippings and ask you if you recognize what those clippings are.

A. They are clippings out of our scrapbook.

Q. Can you give me the approximate dates of some of them?

A. These here—unfortunately, these don't seem to have the dates on them. No, it is only some cases—this has July 5, 1940, on this particular one. There is no indication of the date on that. There only seems to be about one that actually has the date on it. Here is one in 1941, part of the Examiner. Here is from the Toys and Bicycles, June issue of—it doesn't show—just the June issue.

Q. Those are clippings—

A. Here is the Examiner, 1941, and this is from the Vallejo Times in September, 1945.

Mr. Orr: I will ask that the group of clippings just identified by the witness be admitted in evidence as Defendant's Exhibit J.

The Court: It may be admitted.

(Testimony of Allan L. Rowland.)

Mr. Orr: With the individual ads given numerical suffixes in order.

The Clerk: J, J-1, J-2, J-3, J-4, J-5.

(The clippings referred to were marked Defendant's [196] Exhibits J, J-1 through J-5, inclusive, in evidence.)

Q. (By Mr. Orr): When did the practice of the Dollcraft Co. of applying the names of Red Riding Hood, Sugar and Spice, and various of your names to their products come to your attention?

A. In the latter part of last year when Macy's ran that ad, which was about in October.

Q. I will call your attention to the advertisement which has been offered here as Plaintiff's Exhibit 46 and ask if that is the advertisement you refer to.

A. Yes, sir.

Q. Where in the advertisement did you find the designation of any doll or dolls that you considered to infringe your trade-mark rights?

A. Well, they have the ad here, "Exclusive Bisque Story Dolls"; also they have listed "Red Riding Hood," "Little Bo-Peep," and "Sugar and Spice."

The Court: Let me see it.

(The exhibit was handed to the Court.)

Q. (By Mr. Orr): I will call your attention to an advertisement appearing in the Vallejo News Chronicle dated Monday, November 21, 1949, and ask if that is an advertisement that came to your attention.

(Testimony of Allan L. Rowland.)

A. Yes, sir, this advertises new story book dolls encased in bottles, real bisque heads, real hair.

Q. What word or words in the advertisement do you find [197] objectionable?

A. Story book dolls.

Mr. Orr: I will ask that the advertisement just identified by the witness be marked as Defendant's exhibit next in order.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit K in evidence.

(The advertisement referred to was thereupon marked Defendant's Exhibit K in evidence.)

Q. (By Mr. Orr): Following your observation of this advertisement, what, if anything, did you do? Did you check any other stores?

A. Yes, we checked a number of stores around town.

Q. What did you find?

A. Well, we found them being sold in meat markets and 15-cent stores, a liquor store out on 16th and Mission; then we advised counsel to take appropriate action on it.

Q. Have you any information as to whether such action was taken?

A. Yes, sir, it was.

Q. And that was a matter of sending notices of infringement, I assume?

A. That is right.

Q. Did you purchase any of the dolls which are noted in these advertisements? [198]

A. Yes, sir, I had them purchased.

(Testimony of Allan L. Rowland.)

Q. I will direct your attention to three bottled dolls, one bearing the number 201, "Red Riding Hood," another bearing the number 211, "Sugar and Spice," and a third one bearing the number 203, "Little Bo-Peep," and ask if those are the dolls that you had purchased for you following your observation of that advertisement.

A. Yes, sir.

Q. Where were they purchased?

A. They were purchased at Macy's.

Q. They were purchased at your request?

A. Yes, sir.

Q. What transpired at the time those purchases were made? What did they ask for?

Mr. Mellin: Just a moment, please. If your Honor please, we are now calling for hearsay unless this witness was present and heard what was asked for. I object to the testimony as being completely hearsay.

The Court: Objection sustained.

Q. (By Mr. Orr): Who purchased the dolls?

A. There was three different individuals purchased them.

Q. Did you purchase any yourself?

A. No, sir, I did not.

Q. Are those who purchased them in court today?

A. No, sir, they are not. [199]

The Court: How do you get those out of the bottle?

A. I don't know; you have to shake them.

Mr. Morr: Have you purchased——

(Testimony of Allan L. Rowland.)

The Court: I have made an inquiry: How do you get those dolls out of the bottle?

Mr. Mellin: Just take the lid off and they come out, pull it out by the metal lid—just by the metal insert.

(Demonstrating.)

The Court: I am ahead of you.

Gentleman in the Courtroom: The trick is to get it in again. They are just fastened.

The Court: I want you to put it back now.

(The gentleman demonstrated.)

The Court: You can buy twelve of these at a time if you want?

The Gentleman: Yes.

The Court: That would be twelve times two, \$24.00.

The Gentleman: \$1.95.

The Court: If you bought twelve of them?

Mr. Mellin: \$10.20.

Mr. Orr: Do you have the sales receipts that were——

Mr. Mellin: We will put it back. He is going to put it back in. He will give it to the Clerk.

Mr. Orr: I will appropriate this one instead.

The Court: That was all my fault. [200]

Mr. Mellin: May I see those?

(Papers handed to Mr. Mellin.)

Q. (By Mr. Orr): Have you the sales receipts

(Testimony of Allan L. Rowland.)

that were issued at the time those purchases were made? A. Yes, sir.

The Court: Which is this?

Mr. Orr: Sales receipts for the purchases of the dolls just identified by number.

The Court: If he didn't purchase them——

Mr. Mellin: Your Honor, I was just going to object that we have no way of determining whether or not those sales receipts were attached to that sale or purchase.

The Court: Who purchased them?

Mr. Mellin: Besides, they are not binding on us. Anyway, we will stipulate that those dolls were purchased by them from Macy's, but this witness can not testify that that receipt was received at the time.

Mr. Orr: You will stipulate that the dolls were sold by Macy's to agents of the defendant?

Mr. Mellin: That is correct, your Honor.

Mr. Orr: Very well. Thank you.

Mr. Mellin: Sold by Macy's to agents of the defendant.

Q. (By Mr. Orr): Are you acquainted with the individual plaintiff Kerr? A. Yes, sir. [201]

Q. What is your acquaintance with him?

A. What is my what?

Q. What is your former acquaintance with him?

A. Well, I first met him on the golf course, he was a caddie out there, and I put him to work. That was—I just don't know the exact date; it was about 1939 or 1940.

Q. In the plant of your company?

(Testimony of Allan L. Rowland.)

A. Yes, sir, and he was doing part-time work for us and then working on the golf course as a caddie out there. Later on we put him on steady and he became shipping clerk.

Q. How long was he with your organization?

A. Oh, I would say approximately four years.

Q. During that time were his activities confined to any particular part of the plant?

A. Well, Bob had pretty much—Mr. Kerr had pretty much the run of the plant. He was shipping clerk, receiving clerk, had complete information on where we bought all our materials, who we bought them from, how we bought them. Later on he did considerable writing up of orders for material that Nancy wanted ordered. He had a desk in the office in later years and had pretty much the run of the whole organization.

Q. Did he have access or acquaintance with the customers to whom your products were being shipped?

A. Well, he knew them—naturally being shipping clerk, he knew who they were going to, what stores, yes, sir. [202]

Q. Did he have any duties that would call him into the actual plant itself where the dolls were being dressed?

A. Yes, sir, he was through the plant all day at all times.

Q. Did he have opportunity to become familiar with the methods of assembling and dressing dolls?

A. Oh, yes, naturally in the plant all day long,

(Testimony of Allan L. Rowland.)

he acquires a certain amount of information, but it is more or less that type of information that most anybody knows how to do it or knows how it is done, but they don't know the why-for and whereas that they do certain little shortcuts, that's all.

Q. Could he have occupied his position and performed his duties without being familiar with the trade-marks which were applied to your various doll products?

A. No, he couldn't. He was wideawake, he knew what was going on in the plant all the time, and he was familiar with everything that happened there.

Q. He would more or less necessarily know what trade-marks were in use, wouldn't he?

A. That is right.

Q. Are you acquainted with the individual plaintiff Hinz?

A. Yes, sir.

Q. What has been your business connection with him, if any?

A. Well, we were making bisque dolls. That is a clay substance—across the Bay; at least we were having them made, and the two individuals making them just couldn't produce enough, [203] so through contacts—I believe it was through my brother-in-law that we contacted Mr. Hinz, who was making clay dolls in Santa Clara, and after several conferences, why, he agreed to make the dolls for us. And this went on for a period of years. Hinz' dolls were never satisfactory for our product because of the fact—the clay that was used, and we afterwards bought a plant in Stockton and we decided to make

(Testimony of Allan L. Rowland.)

our own dolls. And Mr. Hinz was very much put out about the fact that we were going to make our own dolls and we closed the deal with him.

Q. You paid for the dolls that you had ordered from him?

A. Yes, sir, we settled up at the end, presumably to everybody's satisfaction.

Q. For a period he did serve you, he did supply you dolls to meet your needs, is that right?

A. Yes, sir.

Q. Have you had any business dealings with him since——

A. No, sir.

Q. ——the purchase of the doll bodies was discontinued?

A. No, sir.

Q. When did you first know of an organization making dolls under the name of Dollcraft?

A. Oh, three or four years ago it was called to our attention through the business agent. He asked us if we knew about this outfit making Globetrotter dolls.

Q. At that time did you have shown to you a folder such as is [204] here in evidence as Plaintiff's Exhibit 20?

A. Yes, I believe one of our customers sent it in to us, calling our attention to the fact that somebody in San Francisco was making dolls besides ourselves.

Q. Did you find on that exhibit any use of the names of your various dolls which you thought objectionable?

A. No, there were none on this list at all.

Q. How about the "Fairylend" series?

(Testimony of Allan L. Rowland.)

A. Well, I didn't particularly notice it any more than I noticed it now, just numbers; it looks like something has been left off and not been used.

Q. In connection with the dolls which you had purchased for you from Macy's following the publication of this ad, did you find a folder listing the dolls?

A. Yes, sir.

Q. Is the folder identified here as Plaintiff's Exhibit 29 a folder of the kind you refer to?

A. Yes, sir, it is.

Q. Do you find in that folder a listing of any of the names of the trade-marks that you have registered?

A. Yes, sir, in the "Fairyland" series, "Red Riding Hood," "Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Little Miss Donnett," "Curly Locks," "Goldilocks" and "Sugar and Spice."

Q. What has been your policy with respect to the protecting of your trade-mark rights? [205]

A. Well, we have always considered that they were awarded to us by the Patent Office and as such, why, we were going to do everything possible to take legal action and protect our rights.

Q. And have you during the course of the past ten or fifteen years had any litigation involving others?

A. Yes.

Q. In connection with your marks?

A. Yes, sir, we have been successful in stopping and opposing quite a few registrations, such as "Hollywood Storybook" and "Hollywood Book Doll," and also "Goldie Doll" and "Birthstone Doll

(Testimony of Allan L. Rowland.)

of the Month," and there were a few others that I can't just recall at the present time.

Q. Did you ever come in conflict with Mr. Ippolito with regard to the mark "Mary, Mary, Quite Contrary"? A. Yes, sir.

Q. You opposed registration on that mark, did you? A. Yes, sir.

Q. How did that come out?

A. That was—we successfully opposed it.

Q. Did you ever have any conflict with respect to the mark "Little Miss Muffett"?

A. Yes, sir, we——

Q. What was the nature of that?

A. We successfully opposed that against one of the clothing manufacturers. [206]

Q. In connection with your own registration of "Little Miss Muffett," did you encounter any difficulty? Was it opposed by any other user?

A. No, I believe not.

Q. Referring particularly to the use of "Mary Muffett Tie," by Mary Muffett, Inc., do you recall that? A. That's right.

Q. What was the outcome of that?

A. The outcome of that was that we were successful in registering the "Miss Muffett."

Q. In connection with the difficulty that you have had from time to time with Ippolito and the Hollywood Doll Company, what was the final outcome of that dispute?

A. Well, a settlement out of court whereby he

(Testimony of Allan L. Rowland.)

backed away from the numbers that he was attempting to register.

Mr. Mellin: Just a minute, your Honor. I understand it is a written agreement. Unless that is produced, I am going to object to any testimony because apparently there was a division of spoils in that situation, one got one group and the other another. Unless that whole matter is brought up, I am going to object to any oral testimony from this testimony as to what actually occurred.

The Court: Is there a written document available, counsel?

Mr. Mellin: I was going to offer in evidence a certified copy of the judgment that was entered in that proceeding. With [207] that judgment, your Honor, I understand there was a copy of the agreement by which that judgment was entered into. That one we haven't been able to obtain.

Mr. Orr: The judgment indicates the action taken by the Court. The settlement agreement is not a matter of court record, and I see no reason for producing it.

Mr. Mellin: That is just exactly why we want it.

The Court: If this testimony goes into the record, if it available, it will have to be produced.

Mr. Orr: It is merely to indicate that the proceeding was terminated and that the validity of the marks here involved was conceded.

The Court: It is predicated on an agreement; you can't offer part of it unless the whole goes in.

Mr. Mellin: As a matter of fact, I make demand

on counsel now through the Court for that agreement showing unfair competition and a division of the spoils here.

Mr. Orr: At this time, your Honor, I would like to ask for a recess in order that I might produce the witnesses who purchased the dolls and that I can consider the matter of producing the agreement in connection with the judgment which I had proposed to introduce.

Mr. Mellin: If your Honor please, the other witnesses have no right—I still have this one to cross-examine.

Mr. Orr: If we recess until tomorrow morning, you will [208] have ample opportunity. I have only a very few more questions to ask this witness.

The Court: What will we do about it?

Mr. Mellin: If your Honor please, I am not trying to hold counsel here on that excuse of bringing other witnesses. It is a little bit early for the recess. I realize if you have over night you can ask a lot more questions, and the proceeding is getting unduly lengthy.

Mr. Orr: I would like to continue my further examination of Mr. Rowland until I myself determine whether we can put in the agreement. I have a number of questions which will hinge upon the production of that agreement and the determination, and I am not prepared to offer it at the present time, and I don't want to continue this examination until I have reached that determination. Since it is almost 4:00 o'clock, I am asking that the Court recess until tomorrow morning, at which time we can continue.

The Court: Will you join, counsel, in that motion?

Mr. Mellin: Yes, your Honor.

The Court: Very well; we will take an adjournment until ten o'clock tomorrow morning.

(Thereupon an adjournment was taken to tomorrow, Wednesday, August 23, 1950, at 10:00 o'clock a.m.) [209]

Wednesday, August 23, 1950, 10:00 A.M.

The Clerk: Dollcraft Co. vs. Nancy Ann Storybook Dolls, on trial.

Mr. Mellin: Ready.

Mr. Orr: Ready.

The Court: Proceed.

Mr. Orr: At this time, your Honor, I would like to ask leave to interrupt taking of testimony of Mr. Rowland and put on the stand two witnesses who purchased the dolls that we discussed yesterday afternoon, Mr. Giordano and the lady who bought them. If I may interrupt at this time, I will put them on out of order.

Mr. Mellin: I would prefer to cross-examine Mr. Rowland on that line first.

The Court: Let's conclude with the witness on the stand.

Mr. Orr: But I hadn't completed my examination of Mr. Rowland. I thought you gave me leave to bring——

The Court: No. Let us proceed.

Mr. Mellin: If your Honor please, it may not be of too much importance for me to inconvenience

the witnesses. If it is only going to be very short, I will withdraw my objection.

Mr. Orr: These two witnesses are away from their employment; I promised to get them back as soon as I could. It won't take but a very few minutes. [210]

The Court: Very well.

ALBERT GIORDANO

called for the defendant; sworn.

The Clerk: Would you state your name to the Court?

A. Albert Giordano.

The Clerk: Where do you live?

A. South San Francisco.

Q. What is your business or occupation?

A. I am assistant buyer at the City of Paris.

Q. How long have you been?

A. Four years.

Q. City of Paris? A. Yes.

Direct Examination

By Mr. Orr:

Q. Are you acquainted with Mr. Rowland of the Nancy Ann Storybook Doll Company?

A. Yes, I am.

Q. Did you ever have any conversation with him with reference to dolls which were advertised by Macy's last fall?

A. Not directly.

Q. What, if any, connection have you had with the purchase of dolls from Macy's?

A. Well, Mr. Daly, who is my immediate superior at the City of Paris, told me that he received a call from Mr. Rowland [211] to go and buy a doll,

(Testimony of Albert Giordano.)

“Storybook” doll at Macy’s. So Mr. Daly in turn asked me to go.

Q. Did you go to Macy’s and buy a doll?

A. Yes, sir, I did.

Q. At that time what did you ask for?

A. I asked for a “Storybook” doll.

Q. And what were you given?

A. I believe one was “Sugar and Spice”; I believe the other one was “Little Bo-Peep.”

Q. I will direct your attention to two bottled dolls here, one bearing the name “Sugar and Spice,” and the other bearing the name “Little Bo-Peep,” and ask if those are the dolls that you purchased.

A. I believe they are.

Q. Did you receive a sales slip at the time you made the purchase? A. Yes, I did.

Q. I will direct your attention to a sales slip of Macy’s dated 10/27, and ask you if you recognize that sales slip. A. Yes, sir, I do.

Q. What item does that sales slip call for?

A. One “Storybook” doll, “Little Bo-Peep,” one “Storybook” doll, “Sugar and Spice.”

Q. What is the price? A. \$1.95. [212]

Q. Who is that sales slip made out to?

A. It is made out to A. Giordano.

Q. That is yourself? A. Yes, sir.

Q. The slip was delivered to you along with the dolls at the time you made your purchase?

A. Yes, sir.

Q. Was that a cash purchase or a charge purchase? A. Cash purchase.

(Testimony of Albert Giordano.)

Q. Did you in turn deliver to Mr. Rowland the two dolls you purchased on this receipt?

A. Yes.

Q. Have you any interest whatsoever in this litigation? A. None whatsoever.

Mr. Orr: That will be all.

The Court: Any questions?

Mr. Orr: Oh, at this time I ask that the sales slip be offered in evidence as Defendant's Exhibit next in order.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit L in evidence.

(The sales slip referred to was thereupon marked Defendant's Exhibit L in evidence.)

Cross-Examination

By Mr. Mellin:

Q. You were instructed to ask for a "Storybook" doll, were you? [213]

A. Well, Mr. Daly asked me to go to Macy's and buy a "storybook" doll, which I did.

Q. Had you seen the Nancy Ann Dressed Dolls before?

A. Yes, in our store window at times around Christmas.

Q. And you knew that the dolls that you had were manufactured by Nancy Ann Dressed Dolls?

A. I didn't know who they were manufactured by; all I did was buy a "Storybook" doll.

Q. You weren't under any impression that you were buying a doll made by Nancy Ann, Inc.?

(Testimony of Albert Giordano.)

A. Yes, their name itself implies it is made by Nancy Ann.

Q. Are you an old doll fancier?

A. No, sir, I am not.

Q. The only connection you have ever had with dolls is to see the Nancy Ann dolls?

A. No. I am close with the buyer who bought the stuff. I have been associated with her indirectly, I mean, talking with her in the store. We have meetings and we discuss good items, bad items, what to buy, what not to buy. It is a policy of the store to discuss those things.

Q. When you saw the name "Little Bo-Peep," that simply meant a Nancy Ann Dressed Doll?

A. Primarily I went over to buy a Storybook doll, and Mr. Daly asked me to buy these two particular types, which I did.

Q. Did he tell you that they were Dollcraft dolls? [214]

A. Nancy Ann dolls. He didn't describe them other than he asked me to go over and buy two "Storybook" dolls.

Q. Did you see the name "Dollcraft Co., Inc.," on these jars?

A. It didn't interest me in the least.

Q. It didn't interest you. You weren't fussy whose dolls you went in and bought?

A. Sure, because I was just buying for my superior. I have no idea; we don't have any children, so I went out and did what I was told to do.

(Testimony of Albert Giordano.)

Q. Did Mr. Daly tell you why Mr. Rowland wanted you to buy the dolls?

A. Mr. Daly never discussed anything about Mr. Rowland or anybody outside the store.

Q. He didn't tell you to get the dolls of any certain manufacturer?

A. No. All he said was to buy "Storybook" dolls, and that is all.

Q. How did you happen to buy "Little Bo-Peep"?

A. Just as I told you, he asked me to buy these two.

Q. He asked you to buy "Little Bo-Peep"?

A. And "Sugar and Spice" if available.

Q. Have you known Mr. Rowland before?

A. No, I have no dealings with Mr. Rowland. I have seen him in and out of the store occasionally; I presume he has business there. [215]

Q. The City of Paris is a rather large handler of Nancy Ann dolls, isn't that so?

A. Frankly, I don't know if they do handle them now or not, but I know at the time my particular reference was concerned with this, that they did handle them.

Q. When you went and bought the "Storybook" doll, you thought this was another doll made by Nancy Ann?

A. That is how it impressed me. Mr. Daly told me to buy "Storybook" dolls, so I naturally assumed it was a Nancy Ann doll.

(Testimony of Albert Giordano.)

Q. Have you ever talked about dolls with anybody else? A. No.

Mr. Mellin: That is all.

Mr. Orr: That is all. No further questions.

Mr. Mellin: Just a moment. May I ask him one more question?

Mr. Orr: Surely.

The Witness: Do you want me to get back on the stand?

Mr. Mellin: Yes, if you would.

Q. Are you in any way related to Nancy Ann Abbott in court? A. Repeat that.

Q. Are you in any way related by marriage to Miss Abbott who is in court?

A. No, sir, I am not.

Q. Is Mr. Daly who gave you these instructions, to your knowledge [216] any relation to Miss Abbott or has been?

A. I will tell you the truth, sir; Mr. Daly never discusses any of his private affairs.

Q. Don't you know, as a matter of fact, that Mr. Daly was one of Miss Abbott's husbands?

A. I do not. I never discuss those things.

Q. You never knew that?

A. I don't know anything about his private life; it is none of my business.

Mr. Mellin: That is all.

MRS. JACK McIVER

called for the defendant; sworn.

The Clerk: What is your full name?

A. Mrs. Jack McIver.

Q. Where do you reside?

A. San Francisco.

Q. What is your address?

A. 2347 38th Avenue.

Q. Your business or occupation?

A. I work for the United States Department of Agriculture.

The Court: Proceed.

Direct Examination

By Mr. Orr:

Q. Are you acquainted with Mr. Rowland?

A. Yes, I am. [217]

Q. Did you at any time purchase a doll at his request?

A. Not at Mr. Rowland's request, no.

Q. Did you purchase a doll that you gave to Mr. Rowland? A. Yes, I did.

Q. Will you explain the circumstances under which you purchased that doll?

A. My husband is Mr. Rowland's superintendent, and on the day previous to my purchase Macy's had had an ad in the paper advertising these "Story-book" dolls, and Mr. McIver asked me to go down to Macy's and purchase one. I went in and I asked for a "Storybook" doll, and the young lady took me where they were, took me over to them. I wasn't

(Testimony of Mrs. Jack McIver.)

particularly interested in any particular doll, just so I purchased one. I said, "Are these 'Storybook' dolls?" and she said, "Yes." I said, "Are you sure?" She said, "Well, just a minute." She was apparently a new employee and she called one of the girls and asked her and she said yes, they were.

Q. Is this the doll which you purchased?

A. Yes, it is.

Q. What is the name of that doll?

A. "Red Riding Hood."

Q. At the time you made that purchase were you given a receipt of any kind?

A. Yes, it was a cash purchase and I was given a slip which I gave to my husband. [218]

Q. I will show you a cash receipt in the amount of \$2.02 dated October 27. Will you state whether or not that is the receipt you obtained.

A. Yes, that's it.

Q. Written on there are the words "Red Riding Hood, No. 201, A. L. Rowland." Did you put those marks on there? A. No, I did not.

Mr. Orr: That will be all.

Cross-Examination

By Mr. Mellin:

Q. Did I understand you to say that Mr. McIver was an employee—— A. Yes.

Q. ——of Nancy Ann Dressed Dolls?

A. Yes.

Q. How long has he been employed there?

A. Ten or eleven years.

(Testimony of Mrs. Jack McIver.)

Q. You are familiar with the Nancy Ann dolls, of course? A. Yes, sir, I am.

Q. When you were handed this bottle with the name Dollcraft Company, Santa Clara, California, on it, were you under any impression you were getting a Nancy Ann product made by Nancy Ann?

A. I didn't ask for Nancy Ann; I asked for "Storybook," and I knew I wasn't buying a Nancy Ann "Storybook" doll.

Q. You knew you weren't?

A. That's right. [219]

Mr. Mellin: That is all.

Mr. Orr: No further questions.

I will offer at this time the sales slip identified by the witness as the defendant's exhibit next in order.

The Court: It may be admitted and marked.

The Clerk: Defendant's M in evidence.

(The sales slip referred to was thereupon marked Defendant's Exhibit M in evidence.)

ALLAN L. ROWLAND

recalled on behalf of the defendant; previously sworn.

Direct Examination

(Resumed)

By Mr. Orr:

Q. At this time, Mr. Rowland, I will direct your attention to a copy of an instrument entitled "In the District Court of the United States for the Southern District of California, Central Division,

(Testimony of Allan L. Rowland.)

Nancy Ann Storybook Dolls, Inc., plaintiff, vs. Domenick Ippolito, doing business as Hollywood Doll Manufacturing Co., defendant, civil action No. 5191-WM," and entitled "Settlement Agreement and Stipulation re Facts, and for entry of judgment," and ask if you recognize what that instrument is.

A. It is a settlement agreement and stipulation regarding facts and for entry of judgment.

Q. Is that an agreement which you entered into with the opposing party, Domenick Ippolito, in that litigation? [220] A. It is.

Mr. Mellin: May I look at it, Mr. Orr?

(Paper was handed to Mr. Mellin.)

Q. (By Mr. Orr): Is that the settlement agreement upon which the judgment which you discussed in your testimony yesterday was predicated?

A. It is.

Mr. Mellin: May I see the decree?

(Paper was handed to Mr. Mellin.)

Mr. Mellin: If your Honor please, this is a consent judgment in which Judge Mathes has inserted in his own handwriting——

The Court: Judge who?

Mr. Mellin: Judge Mathes in the Southern District: "That as between the parties and for the purposes of this action"—this consent judgment would only be as between the parties there concerned, and would have no bearing and be of no assistance to

(Testimony of Allan L. Rowland.)

this Court, and I object to the introduction of both the agreement and the judgment on the grounds that they are not only incompetent, but completely immaterial and of no force and effect in this court.

Mr. Orr: On the contrary, it constitutes evidence of the recognition of the trade-marks of the defendant in this action by a competitor.

The Court: I will allow it for what it is worth. It goes [221] to the weight of the testimony.

Mr. Orr: I will ask at this time that the copy of the settlement agreement—incidentally, this is a conformed copy, not the original.

Mr. Mellin: If your Honor please, I am going to object unless I have an opportunity to compare the original with it. They must have the original in their possession. I insist upon comparison with the original, and I am going to object to a copy.

Mr. Orr: That will give you ample opportunity to make such comparison.

Mr. Mellin: I object to its entry at this time until that comparison is made.

Mr. Orr: I can give you my assurance and the Court my assurance that it is an exactly conformed copy.

The Court: Subject to check, I will allow it. His legal objection is good.

Mr. Orr: The original I haven't been able to get in my custody so far, but it will be here in the course of the day.

The Clerk: The settlement agreement is marked Defendant's N in evidence.

(Testimony of Allan L. Rowland.)

(Settlement agreement was thereupon marked Defendant's Exhibit N in evidence.)

Mr. Orr: I would like to offer the certified copy of the judgment as defendant's next in order.

The Clerk: Defendant's Exhibit O in evidence. [222]

(Certified copy of judgment was thereupon marked Defendant's Exhibit O in evidence.)

Mr. Orr: In paragraph 1 appearing at the bottom of the judgment, it is stated:

"That as between the parties and for the purposes of this action, each and all of the following trade-marks are owned and have been duly and validly registered by plaintiff, and have been infringed by defendant set forth in Section XI of plaintiff's complaint, by defendant's use of the trade-marks listed in opposition thereto in paragraph XI of plaintiff's complaint."

And on page 2 there appears a list of trade-mark registrations and registration dates.

Q. I will now direct your attention to plaintiff's complaint in the action and to the two lists of trade-marks appearing in two columns, one designated Plaintiff's Trade-marks, and the other designated Defendant's simulated marks. I would like to have you read in the record the marks which are listed in that paragraph giving first the plaintiff's mark

(Testimony of Allan L. Rowland.)

and the corresponding mark which appears in the second column.

Mr. Mellin: If your Honor please, for the sake of saving time I object to that. I think the document speaks for itself. He can make any comparison he wishes of the document.

Mr. Orr: I would like to have it in the record.

Mr. Mellin: I will stipulate the whole paper may be [223] written in the record. I don't see any point in having this witness read to the Court portions of the document and require us to read all of it.

Mr. Orr: It is, however, more important to read portions of this order; it brings it into the record in a logical order without the burden of sifting through.

The Court: We are not trying this case, are we?

Mr. Orr: We are not trying that case; we are identifying the marks that have been referred to in the judgment which has already been offered in evidence.

Mr. Mellin: They are already in the judgment.

Mr. Orr: These are the marks——

The Court: I will allow him to make a record of this.

Mr. Orr: The marks that have been given validity or recognized validity are listed in the judgment, but the marks which were charged to be infringed do not appear in the judgment, and this is for the purpose of identifying the marks that were charged to infringe that I wish the witness to read from paragraph XI of the plaintiff's complaint.

(Testimony of Allan L. Rowland.)

The Court: Go ahead.

A. "Storybook," "Hollywood Book," "Mother Goose"—and preceding that is the "Nursery Rhymes," "January Girl, "February Girl"—

Q. (By Mr. Orr): Perhaps it would be well to recite the Nancy Ann mark and then the Ippolito mark.

A. Nancy Ann mark: "March Girl," Ippolito mark, "March." [224]

Nancy Ann mark: "April Girl"; Ippolito mark, "April."

Nancy Ann mark: "May Girl;" Ippolito, "May."

Nancy Ann mark: "June Girl"; Ippolito mark, "June."

Nancy Ann mark: "July Girl"; Ippolito, "July."

Nancy Ann mark: "August Girl"; Ippolito mark, "August."

Nancy Ann mark: "September Girl"; Ippolito, "September."

Nancy Ann mark: "October Girl"; Ippolito mark, "October."

Nancy Ann mark: "November Girl"; Ippolito mark, "November."

Nancy Ann mark: "December Girl"; Ippolito, "December."

Nancy Ann mark: "Alice, Sweet Alice"; Ippolito mark, "Alice in Wonderland."

Nancy Ann mark: "Alice in the Looking Glass"; Ippolito mark, "Alice in Wonderland."

Nancy Ann mark: "Annie at the Garden Gate"; Ippolito mark, "Garden Gate."

(Testimony of Allan L. Rowland.)

Nancy Ann mark: "Betty"; Ippolito had three marks: "Betty Rose," "Sleeping Betty" and "Princess Betty."

Nancy Ann mark: "Betty Blue"; Ippolito mark, "Bluebell."

Nancy Ann mark: "Little Betty Blue"; Ippolito mark, "Little Bluebell."

Nancy Ann mark: "Little Joan"; Ippolito mark, "Jumping Joan."

Nancy Ann mark: "Little Miss Donnett"; Ippolito mark, "Little Miss Donnie."

Nancy Ann: "Little Miss Muffett"; Ippolito mark, "Muffett [225] With a Spider."

Nancy Ann mark: "Little Miss Donnett"; Ippolito mark, "Little Miss Donnie," which is repeated again.

Nancy Ann: "Lucy Locket"; Ippolito mark, "Lucy With Her Pocket."

Nancy Ann: "Margie Daw"; Ippolito, "Little Miss Teeter Totter."

Nancy Ann: "Mistress Mary"; Ippolito mark, "Mary, Mary, Quite Contrary."

Nancy Ann: "Polly, Put the Kettle On"; Ippolito mark, "Polly Prim."

Nancy Ann mark: "Pretty Maid"; Ippolito mark, "Pretty Kitty."

Nancy Ann mark: "Queen of Hearts"; Ippolito mark, "Queen Silver Bell."

Nancy Ann mark: "Red Riding Hood"; Ippolito mark, "Little Red."

(Testimony of Allan L. Rowland.)

Nancy Ann mark: "Ring Around the Rosy"; Ippolito mark, "Little Rosie."

Nancy Ann mark: "Roses are Red"; Ippolito had three marks that he used, "Rose Red," "Little Rosie" and "Little Red." That is all.

The Court: What is this recital? What is the purpose of the offer?

Mr. Orr: The purpose of the offer is to identify the [226] marks that are referred to in the judgment which has been offered in evidence here. The judgment indicated it was predicated in part upon the marks which are specified in the bill of complaint, and it is to indicate which marks were charged to infringe which other marks without the necessity of introducing this complaint.

Mr. Mellin: I think it is totally immaterial; we are not interested in "January Girl" or "Rosie Red" or things of that sort.

Mr. Orr: We are interested in determining the marks that were held to be valid and infringed by that decree.

Mr. Mellin: They were held to be valid and infringed because of the stipulation.

Mr. Orr: They are recognized to be valid.

Mr. Mellin: That is not binding in this case.

Mr. Orr: So held by the court and conceded by a big competitor in the field, the validity of certain of these marks. The other marks are set forth in the judgment, but the marks which were charged to infringe do not appear in the judgment.

The Court: You must always keep in mind that

(Testimony of Allan L. Rowland.)

this judgment is strictly between the parties and limited to that.

Mr. Orr: Apart from that fact, it still shows recognition by the trade of the validity of many of these trade-marks.

The Court: I don't follow you.

Mr. Orr: The defendant in the action stipulates and agrees [227] that the marks are valid and have been infringed.

The Court: That is his stipulation.

Mr. Orr: The judgment does not indicate what the infringing marks were, and it was charged in very harsh language that there had been an infringement of these marks, and I wish to convince your Honor that there has been no acquiescence. We have charged them with infringing a considerable number of marks. If your Honor will permit, we would like to show what those marks were here in a case where we dismissed our complaint and in other cases the defendant in the case has conceded the marks as valid and infringed, and agreed to discontinue their use.

The Court: I want to caution you in relation to this judgment. I want you to have in mind that while it is a judgment it is binding and it is binding only upon the parties to that contract.

Mr. Orr: That is all. While we recognize that, your Honor, it still is evidence of the recognition by a serious competitor of the validity of a great number of these marks, and I want the record to show whereas in this judgment it has been held that

(Testimony of Allan L. Rowland.)

the infringement has been withdrawn, I wish your Honor to know here that it wasn't a matter in a case where there was a serious question of infringement that we were willing to take off and withdraw our charge of infringement. The defendant, on the other hand, recognized that there was infringement [228] and he conceded the issue. There certainly were no spoils as implied by counsel.

The Court: It occurs so often and the courts can not control it. That is the reason why it doesn't impress me very much, any private agreement between the parties and the judge approving it has very little to do with the merits.

Mr. Orr: I am concerned in this particular case because of the implication that there was some irregularity in the settlement, some violation of the Fair Trade Act.

The Court: I will allow you a great deal of latitude to make statements that sometimes do not impress the Court.

Mr. Orr: With the lists and the opposition of the marks that have been read into the record, it will be perfectly clear what marks were recognized and conceded validity and which ones were withdrawn from the charge of infringement and why.

The Court: That did not impress me, I mean as far as the merits of this case are concerned, the statement by counsel. Sometimes in their anxiety to get results——

Mr. Orr: I am just guarding against the possi-

(Testimony of Allan L. Rowland.)

bility that your Honor might gain an improper impression from the comment.

The Court: No; I have seen it too often.

Q. (By Mr. Orr): I will direct your attention to an instrument appearing to be a Dun & Bradstreet report on Dollcraft Company, Inc., comprising three pages, the principal part being dated [229] January 18, 1949, and with the supplemental sheet dated July 8, 1949, and ask if you recognize what that instrument is.

A. Report—Dun & Bradstreet report on Dollcraft, Inc.

Q. Was that report furnished to you at your request? A. Yes.

Q. Will you please indicate from that report the indicated worth of the Dollcraft Company?

Mr. Mellin: May I object to that, your Honor, to introducing this testimony. We will stipulate that we are a small concern.

Mr. Orr: The purpose of this is to show the relative financial ratings of the company and the two individual defendants who are interested.

Mr. Mellin: That might be material. It is not material by a Dun & Bradstreet report; that is purely hearsay. There is nothing here to cross-examine.

Mr. Orr: We are putting it in as evidence of their worth; we are willing to put it in at its face value, whatever that may be.

Mr. Mellin: It is still incompetent, clearly incompetent and irrelevant and immaterial. These

(Testimony of Allan L. Rowland.)

reports have proved notoriously inaccurate. If you want worth, you can put the witnesses on the stand. They are in court. We will stipulate that we are rather small.

Mr. Orr: Will you stipulate that the firm of Hinz & Kerr [230] is valued at the approximate sum of \$120,000.

Mr. Mellin: Mr. Kerr and Mr. Hinz are both in court. You have the perfect privilege of putting them on and asking them.

Mr. Orr: We will call them in due course.

I wish in the meantime to have the document identified and the amounts indicated by the documents put into the record.

A. This shows a net worth——

Mr. Mellin: If your Honor please, I would like a ruling on that objection.

The Court: I will sustain the objection.

Q. (By Mr. Orr): Among the marks which you have registered, is there included the mark "Alice Through the Looking Glass"?

A. Yes, we have registered that one.

Q. Before registering that mark, did you make any investigation to determine whether or not it had been previously registered?

Mr. Mellin: If your Honor please, may I inquire from counsel through the Court the purpose of this? We are not charged in the cross-complaint on any trade-mark registration such as that. In fact, we are unaware of it, and it is entirely outside of the issues of this case.

(Testimony of Allan L. Rowland.)

Mr. Orr: The purpose is to show that among the dolls which they put out is a doll called "Alice in Wonderland." I wish to show that our client did not adopt "Alice in Wonderland" because it had been previously registered by another firm. [231]

Mr. Mellin: We are not charged with infringing the registration of somebody else other than the parties here. What difference does it make whether they registered it or did not register it?

Mr. Orr: It is evidence of the good faith of the Nancy Ann organization in selecting only those marks which are available and have not been registered by others. It further indicates the attitude of the cross-defendant in this action of appropriating as his property not only Nancy Ann, but the copyright property that was referred to yesterday and the registered marks of another organization.

The Court: What is this document you have in your hand? A. The price list.

Mr. Orr: That is the price list that I handed to him. I was merely asking him whether he had registered "Alice in the Looking Glass."

A. Yes, sir.

Q. Did you make a search in that connection?

A. Yes, sir, we made a search and found that it was not registered and not being used at the time.

Q. In connection with that search, was it ascertained whether any other marks of a somewhat comparable character had been registered?

A. Yes, "Alice in Wonderland" had been registered by one of the doll companies; that is why we

(Testimony of Allan L. Rowland.)

changed and did not register [232] "Alice in Wonderland."

Q. I will direct your attention to a document entitled "Trade-Mark Search Report," marked "Search Alice Through the Looking Glass," and ask you if you received that report. A. Yes, sir.

Q. What is the first item appearing at the head?

A. "Trade-Mark Search Report Based on U. S. Patent Office and Common Law Records," covering search of "Alice Through the Looking Glass."

Q. What is the first item that appears in the report, Mr. Rowland?

A. "Alice in Wonderland"—shows it was registered by Alexander Doll Company, first used in 1933.

Q. Does that give the registration number?

A. Registration number 304488.

Q. And the date? A. July 11, 1933.

Q. Referring to the second page of the document, the typewritten sheet at the bottom, will you read that?

A. "Alice Through the Looking Glass" is not found as an unregistrable mark for dolls and doll clothes.

Mr. Orr: I will offer the copy of the search report as defendant's exhibit next in order.

Mr. Mellin: If your Honor please, may the record show that that is some attorney's opinion, it is not an official document? [233]

The Court: The objection will be sustained.

Mr. Mellin: I object to it.

Q. (By Mr. Orr): Do you know of your own

(Testimony of Allan L. Rowland.)

knowledge that the Alexander Doll Company is using or has used the mark "Alice in Wonderland"?

A. Yes, sir, it has.

Q. Have you any independent knowledge that the mark is registered in the name of that company?

A. Through that document, yes, sir.

Q. But not otherwise? A. No, sir.

Q. I notice in connection with the price lists which were offered in evidence yesterday that there are two price lists for the year 1950. Will you explain why that occurred?

A. One was the opened eyes and we changed in March to movable eyes at an increased price, so therefore we had to put out a new price list.

Q. Has there been any other material change in your line in the last few months? A. No, sir.

Mr. Orr: No further questions.

One moment, Mr. Mellin. We have three dolls here which have been identified.

Mr. Mellin: We will stipulate they are the same as the other dolls. [234]

Mr. Orr: Will you stipulate they are identical with the correspondingly named dolls that are already in evidence?

Mr. Mellin: Yes.

Mr. Orr: As Plaintiff's Exhibits 30, 37 and 32?

Mr. Mellin: Surely; so stipulated.

Cross-Examination

By Mr. Mellin:

Q. Did I understand you to say yesterday when I

(Testimony of Allan L. Rowland.)

was cross-examining you, that as far as your knowledge was concerned, no one had put out dolls with the names of nursery rhymes and storybook characters except Nancy Ann, to your knowledge, or was I mistaken in that?

A. That we only put out those dolls?

Q. No; that is correct.

A. No, we put out other dolls.

Q. No, you misunderstood me. Didn't I understand you to testify yesterday afternoon in response to questions by me that, as far as you knew, no one had put out miniatures, small dolls, bearing nursery rhyme character names other than Nancy Ann dressed dolls? A. No, I didn't say that.

Q. You didn't say it?

A. I don't believe so.

Q. Well, let us have the facts then—other than this plaintiff, of course.

A. They can put out nursery rhyme dolls. We don't claim [235] exclusive use of nursery rhymes; all we are interested in are the nursery rhyme dolls we have copyrighted.

Q. That is all you are interested in?

A. There are thousands of other ones if you wish to put them out.

Q. Then it has been the practice for many years, for several decades, to put out dolls, small dolls with the names of nursery rhymes and storybook characters? A. No, sir, it has not.

Q. All right. How about the doll put out by the

(Testimony of Allan L. Rowland.)

Alexander Doll Company as early as 1933 bearing the name "Alice in Wonderland"? Isn't that a storybook doll character?

A. Mr. Mellin, for your information, it isn't a miniature doll that you are talking about. And Alexander Dolls have only a very short time made miniature dolls; they always made big dolls.

Q. What do you call a big doll?

A. Sixteen or seventeen or eighteen inches.

Q. Would it actually make any difference, the size of the doll?

A. Yes, it would make a difference. This ideology Nancy Ann has created back in 1937 has brought the small dolls into their own, has created an entirely new field.

Q. As a matter of fact, isn't it a fact that there are thousands and thousands and thousands of small dolls, dressed dolls, [236] sold besides the Nancy Ann dolls?

A. Presumably. I wouldn't say thousands; I would say quite a few.

Q. As a matter of fact, churches in their bazaars put out perhaps more dressed dolls than Nancy Ann makes completely, isn't that a fact?

A. No, it is not a fact.

Q. It is not a fact? A. No.

Q. You don't know that yourself?

A. We have sold them dolls. The amount we have sold them for church bazaars was very limited.

Q. They also obtain those undressed dolls from other sources?

(Testimony of Allan L. Rowland.)

A. That is correct. If they did so much business with dolls in one year, they wouldn't have to do it again, if there was so many dolls sold.

Q. Let us take dolls that have been sold for children's dolls. Isn't it a fact that over several decades dressed dolls have been sold bearing the names of fictional characters, in storybooks and nursery rhymes? A. That I can't answer.

Q. You know at least one, the Alexander line, has been sold for decades.

A. Not for that far back.

Q. Well, 1933? [237]

A. The records show that they had a doll in 1933 marked "Alice in Wonderland." I never saw the doll itself.

Q. And that is the only one that you know of that was put out that was ever named after a storybook or nursery rhyme character?

A. No, I told you a minute ago, the nursery rhymes, they can call them anything they want; we are not interested in that; there are thousands of nursery rhymes on the market to choose from; they don't have to choose from the ones that we took.

Q. As a matter of fact, you have adopted various nursery rhyme character names for dolls over the years and then abandoned the use of them, haven't you?

A. A few we have abandoned, yes, sir; very few.

Q. And that is true of the other lines of your dolls?

(Testimony of Allan L. Rowland.)

A. We have changed our dolls from time to time, yes.

Q. And each of the dolls that you put out under a particular name, you put a little label around the wrist with the name that they have, don't you?

A. That is correct.

Q. And that goes for all your dolls?

A. Yes, sir.

Q. For example, in your various series, for example, your American Girl Series that you had, you would put a little band around each arm, "Quaker Maid," "Colonial Dame," and so forth, and that would be true, for example, among this lot—— [238]

A. It is true of all our dolls; we put labels on all of them.

Q. So that in each instance those marks are in a sense, while maybe not registered, are your trade-marks, isn't that so?

A. Yes, sir, both registered and unregistered.

Q. They are all your trade-marks?

A. Yes, sir.

Q. Then it is a matter of fact you would probably have in the neighborhood of at least 105 or 106 trade-marks at the present time, wouldn't you, registered and unregistered?

A. Yes, sir.

Q. And each one would denote the origin of the goods in the Nancy Ann Dressed Doll Company, isn't that a fact?

A. Each one would denote the origin.

Q. The origin of the doll as being a product of Nancy Ann?

A. That is correct.

(Testimony of Allan L. Rowland.)

Q. So that when you see a doll with any label or legend that is among this list, that would mean it originated with Nancy Ann Dressed Dolls, Inc.?

A. Yes, sir.

Q. And that would be true of all of your 102 doll names that you are using at the present time?

A. Yes, sir.

Q. And it was the actual purpose, wasn't it, of each of those names, of each of these 102 names, to indicate that Nancy Ann was the producer of that doll? [239]

A. That's right; strictly on the advice of counsel.

Q. That is also true, isn't it, that as far as you are concerned, that when the appellation "Little Red Riding Hood" was put on the doll, that it did not describe any one character that the doll represented; it was merely to indicate that it was manufactured by Nancy Ann Dressed Dolls, Inc.?

A. And it was Nancy's interpretation of Little Red Riding Hood.

Q. Then it was put on for at least one purpose, of indicating the character in the story-books and nursery rhymes which the doll represented?

A. As her interpretation, yes, sir.

Q. Now I show you a 1941 price list of the Nancy Ann Dressed Dolls, Inc., and I call your attention to this. You recognize this?

A. Yes, sir.

Q. And that is an authentic list?

A. Yes, sir.

Q. I call your attention to what you term the Around-the-World-Series, and under that you have

(Testimony of Allan L. Rowland.)

French, Swiss, Dutch, Belgian, Spanish, Portuguese, Irish, Hungarian, Swedish, Mexican and Norwegian. Each one of those dolls had a little wristlet; for example, the Swiss doll had the name "Swiss" on it?

A. That is correct. [240]

Q. And that was your trade-mark?

A. Yes, sir.

Q. And that was descriptive of the doll or not?

A. No, it was not descriptive. It was Nancy Ann's interpretation of what that doll should look like.

Q. And it was purely for the purpose of indicating the origin of the goods, in Nancy Ann Dressed Dolls, Inc.?

A. That is right.

Q. Do you still have under what you call the Storybook Series in this 1941 list—I notice it says—this may not have been the Storybook Series description, "Little Betty Blue," "Little Sweet Miss," and so on, including "Alice in Wonderland." You told me you didn't adopt "Alice in Wonderland" a moment ago; did you tell us that?

A. Yes, sir, I made that statement.

Q. Would you see if it is in that list, please?

A. Yes, sir, it is on this list, No. 125.

Q. Can you tell us from that list of storybook characters and nursery rhyme characters which of those dolls listed there and named under the title "Description" that you do not at present manufacture and sell?

A. Well, I would have to have the 1950 price list, that one there, to tell; there is so many of them

(Testimony of Allan L. Rowland.)

changed it is hard to—"A Dillar-A-Dollar, a Ten o'Clock Scholar," we do not use. "Here I Am Little Joan"—no, excuse me. "Little Boy [241] Blue" we have—we discontinued for a number of years; it is discontinued now, "Little Boy Blue." "He Loves Me, He Loves Me Not." I don't believe we use "Lucy Locket" at the present time. We do not use "Alice in Wonderland" at the present time, or "Pussy Cat Pussy Cat"; "1, 2, 3, 4"; "Elsie Marley"; "Polly Put the Kettle On"; "Jack and Jill"; "Topsy and Eva"; "Hansel and Gretel"; "Gerda and Kay," and the "Babes in the Woods," that is all.

Mr. Mellin: Thank you, Mr. Rowland. Now I will offer the 1941 price list that I have just been discussing in evidence as plaintiff's next in order.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 58 in evidence.

(Whereupon the price list referred to was marked Plaintiff's Exhibit No. 58 in evidence.)

Q. (By Mr. Mellin): By the way, Nancy Ann Dolls at the present time are plastic dolls, the bodies? A. Yes, sir.

Q. Not bisque? A. No, sir.

Q. I hand you Exhibit 58, which is the 1941 price list, and I hand you Defendant's Exhibit H-8, which is the 1945 price list. I hand you Exhibit H-10 which is the 1947 price list; H-11, the 1948 price list; H-12, the 1949 price list; H-13, 1950 price list—there are two of these? [242]

A. Yes, sir.

(Testimony of Allan L. Rowland.)

Q. H-14, 1950 price list; H-6, 1943 price list; H-7, 1944 price list; H-5, 1942 price list; H-3, 1940 price list; H-2, 1939 price list, and H-9, 1946 price list, and I will ask if in any place in there does there appear the word or trade-mark "Story" in connection with any of your dolls?

A. No, I can tell without looking at them.

Q. As a matter of fact, you have never used the word "Story" in a trade-mark sense, have you?

A. Not in the publication of our price list.

The Court: The word what?

Mr. Mellin: Story—S-t-o-r-y.

Q. That was purely registered to put another picket in this fence around this type of doll business, isn't that a fact?

A. No, it was registered with the name "Story"; we intended to use it.

Q. You intended to use it?

A. Yes, we have. We used it in a sense where the dolls——

Q. In a technical way to comply with the statute? A. Probably a legal way.

Q. Would you say when you see the word "Story" in connection with dolls that is a doll product of Nancy Ann Dressed Dolls, Inc.?

A. Oh, to a child's mind, I would say yes, very much so.

Q. As a matter of fact under your theory of Nancy Ann's developing of these fairyland creatures and dolls, almost any [243] child hearing of any one of the fairyland dolls or any fairyland or

(Testimony of Allan L. Rowland.)

story-book character would be likely to think it is a Nancy Ann Doll; is that so?

A. That is correct.

Q. And so that actually from your theory of it any doll, any small doll, small doll that was named for any of the well known story-book characters would to you indicate that it was—should indicate that it is the product of Nancy Ann Dolls, Inc.?

A. No, not necessarily. After all, when ten million dolls have been produced and sold all over the United States, the youngsters who are our customers naturally come to recognize a story-book character as a Nancy Ann Doll. It isn't saying it is our doll by any means.

Q. Is that true of the foreign dolls which you have put out among those ten million?

A. Not necessarily.

Q. But it would not be under the foreign dolls and the other dolls like the "Bride" and those, but as far as the story-book characters are concerned, it would be true?

A. That "Bride," yes, and the "Bridesmaids," and story-book characters.

Q. How many years, have you determined, before Nancy Ann made a doll dressed to characterize a bride, had a doll been so dressed to your knowledge?

A. Well, probably long before I was born. [244]

Q. So that if you apply the appellation of "Bride" to them, it would be purely of a doll dressed to represent a bride, wouldn't it?

(Testimony of Allan L. Rowland.)

A. Well, Nancy Ann's interpretation; but we never attempted to register that doll. That is one of the dolls we don't intend to register.

Q. One of the marks that you complain of which we use is the term "June Bride" as applied to a doll dressed as a bride; by the way, is there someone back there helping you answer?

A. No, I wish there was.

Q. I just wanted to make certain of that. "June Bride." Would you say that that term is not descriptive of a doll dressed as a bride?

A. It may be. As far as we are concerned, it is not descriptive of Nancy Ann's interpretation of what——

Q. I am talking of the Dollcraft doll.

A. If they want to make——

Q. That isn't Nancy Ann's interpretation, is it?

A. No, it is not.

Q. I don't mean to argue with you; I beg your pardon. One of the dolls by the Dollcraft people is dressed as a bride, you know that?

A. Yes, sir.

Q. And it carries the name "June Bride"?

A. Yes. [245]

Q. And you have complained that it is an infringement of one of your dolls?

A. We have only complained about the "June."

Q. Just the "June" part of it? A. Yes.

Q. Wouldn't you say that the appellation "June Bride" as it applied to a doll dressed to simulate a

(Testimony of Allan L. Rowland.)

bride—would you say that is descriptive of the doll?

A. It is descriptive of their doll, yes.

Q. It would be descriptive of our doll?

A. Yes.

Q. Purely descriptive, is that a fact?

A. Yes.

The Court: We will take a recess.

(Recess.)

Q. (By Mr. Mellin): The “June Bride” doll that we have just been discussing is Plaintiff’s Exhibit 38, isn’t that a fact? A. Yes.

Q. I asked you the question whether or not the word “story” when used in connection with dolls indicated that the producer of the dolls was Nancy Ann Dressed Dolls, Inc., and as I recall it, you said it did? A. Yes, sir.

Q. And to the same extent the words “Fairy Tales,” “Fairyland,” and “Storybook” would apply? [246] A. Yes, sir.

Q. Now, I notice on one of the brochures of Nancy Ann, which I hand you, and I ask you to disregard my own pencil marks on there to indicate the notation of 102, that three times across the top appears the name “Storybook Dolls,” and underneath that is a notation “Trade-Mark Registered.”

A. Yes.

Q. Your trade-mark registration pertains only to “Storybook”? A. Yes, sir.

Q. Would you say that when the words are used together, “Storybook Dolls,” that that would indicate dolls representing characters in story books

(Testimony of Allan L. Rowland.)

or not? A. Yes, they would, story-book dolls.

Mr. Mellin: I offer the little brochure that I have shown the witness and ask that it be admitted in evidence, no regard to be paid to the pencil marks on it, they are my own.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 59 in evidence.

(Whereupon the brochure referred to was marked Plaintiff's Exhibit No. 59 in evidence.)

Q. (By Mr. Mellin): Now, when did Mr. Patterson begin to handle your line as a manufacturer's agent, Mr. Rowland? A. In 1937.

Q. And he traveled rather extensively and made contacts for the company in the various department stores? [247]

A. He traveled from Kansas City—no, when he first went to work with us he was employed in the Deep South working for Keystone Brothers in San Francisco and working our dolls as a sideline.

Q. And that territory was extended, was it?

A. No, he was transferred by Keystone Brothers to another territory which took him from Kansas City to New York.

Q. Then at that time he was traveling substantially all east of the Mississippi?

A. Yes, sir; that is, above the Mason and Dixon line.

Q. He wasn't an employee, was he?

A. No, sir, he was not.

Q. He was a manufacturer's agent?

(Testimony of Allan L. Rowland.)

A. Yes, sir.

Q. And he had been a rather successful one on leather goods and what have you?

A. Yes, sir, from what I understand.

Q. And at the time that he handled your dolls he also handled these other lines?

A. Yes, sir, Keyston Brothers.

Q. That is in San Francisco? A. Yes, sir.

Q. How long did he stay with you?

A. Until 1945.

Q. That was in the beginning of 1945? [248]

A. Yes, sir.

Q. As a matter of fact, you cut his fee from ten per cent to 1 per cent in 1944, didn't you?

A. Yes and no.

Q. You cut it first from ten to seven and one-half?

A. No, sir; we asked him, with our other representatives—we were having financial difficulty, and we asked Mr. Patterson along with the other representatives to not call on the accounts or have anything to do with them and we would coast along with them and pay them 1 per cent commission until things got straightened out.

Q. That was during the war? A. Yes, sir.

Q. When you didn't need any representatives to sell goods at that time?

A. That was one of the reasons, yes, sir.

(Testimony of Allan L. Rowland.)

Q. And Mr. Patterson then said he couldn't afford to handle the line any more?

A. No, he wasn't handling the line; all he had to do was just collect 1 per cent each month and do nothing.

Q. I mean, he didn't accept the one per cent?

A. That's right.

Q. He told you he would prefer not to handle it?

A. Yes, sir.

Q. But you didn't part bad friends? [249]

A. No, sir, but he did. I will inject something more in there.

Q. Go ahead.

A. We told Mr. Patterson we didn't need him any more because he was handling another line of dolls, which happened to be the Kerr and Hinz dressed dolls.

Q. That was after you cut his percentage to 1 per cent?

A. No, just at the same time. It may be after or before, but it all came about because of that.

Q. Undressed dolls was not a competitive line?

A. We have undressed dolls in our line.

Q. Do you? A. Yes, sir.

Q. Who do you sell them to?

A. All the department stores.

Q. Was he handling undressed dolls for you, too?

A. We had undressed dolls at the time if anybody wanted to buy them.

Q. As a matter of fact, Mr. Rowland, you were

(Testimony of Allan L. Rowland.)

rather choosy about whom you sold dolls to, is that correct? A. That is correct.

Q. As a matter of fact, if an account was small and not impressive, they couldn't be a customer?

A. No, that is in error; if their financial standing was such it would cause hardship, we would prefer selling——[250]

Q. For example, you always refused to sell to large chain stores, did you? A. That is correct.

Q. For example, you commenced selling your dolls in flower shops, didn't you?

A. No, we didn't commence,——

Q. You did in the early days sell to flower shops? A. Yes, we sold a few.

Q. Then your representatives were instructed they couldn't sell to flower shops?

A. No, sir, that is a misstatement. I believe there was only one man in the United States that sold florist shops. We found out they were interfering with the department stores and we stopped shipping dolls to them.

Q. What about the candy stores?

A. The few candy stores we had, one of them, which was Mr. Patterson's customer, under the name of Annie's, we didn't know for a long time, then we discontinued that because it was misrepresented in the first place.

Q. As a matter of fact, the practice is that now you sell almost exclusively to department stores, and to name gift shops?

(Testimony of Allan L. Rowland.)

A. The better gift shops, yes,—better, I mean, financially.

Q. One of your complaints here is that selling to smaller shops and what have you by the Dollcraft Company in some fashion brings you out of the higher brackets, or, let us say, lowers [251] your dignity?

A. No; I think that is a misstatement on your part. I don't think dolls of the type sold to children should be sold in liquor stores. I don't think it is fitting with the dolls.

Q. You only know of one instance of that kind?

A. That's right. I didn't go around town looking; it was called to my attention.

Q. Did you consider it unfair of Mr. Patterson to also handle and continue to handle a line of undressed dolls?

A. Any time a representative who is working for you handles another line, whether it is competitive or not, and doesn't tell you about it, it is unfair. No firm would stand for it.

Q. Let us assume after he severed his connection with you that he then commenced to handle undresser dolls; would you consider that act as an unfair one in any fashion?

A. No, I guess a man has to make a living, but he was calling on our same customers.

Q. Those customers—you make no charge that anyone used your customer list?

A. No, naturally.

(Testimony of Allan L. Rowland.)

Q. In fact, the prospective retailers for dolls is not a matter of confidential information?

A. No, sir; it is universal.

Q. Now, with respect to Mr. Kerr, when did he leave your employ? [252]

A. In the middle of '44.

Q. And what did he do after that, to your knowledge?

A. Well, I don't know what he did for a while.

Q. You know, as a matter of fact, he also went into the business of undressed dolls, don't you?

A. Yes, after leaving our place disgruntled, he entered the business of undressed dolls.

Q. What was he disgruntled about? Because he wanted a raise and you didn't see fit to give it to him?

A. No, he wanted to be superintendent or else, so we gave him the "or else."

Q. Not getting a promotion, he went away disgruntled?

A. He was getting all he was worth. That is generally the way you base people's pay, with our people.

Q. He was general shipping clerk when he left?

A. That was his classification.

Q. Then he went into the undressed doll business, did he?

A. Yes, sir.

Q. Do you make any charge that it was unfair of that Kerr that went into the business of dressed dolls?

(Testimony of Allan L. Rowland.)

A. No, when he leaves us he is entitled to do anything he wishes.

Q. (By The Court): What was his salary when he left?

A. Without looking it up, sir, I couldn't tell you.

Q. Approximately? [253]

A. I would say in excess of \$60 a week. That was in 1944.

Q. (By Mr. Mellin): To your knowledge, he wasn't connected in any fashion with any dressed dolls for some years after that?

A. That is right.

Q. In other words, as far as you know, not from 1944 up to 1948?

A. That is right.

Q. Or the middle of '48?

A. Yes.

Q. And you don't make any charge here, do you, that he improperly used any of your customer lists?

A. Well, we don't make any charge, but the fact still remains that a number of our resources reported back to us that the company was trying to buy material from them, so we just—they automatically said they were selling to Storybook Dolls, and they wouldn't sell to them—even to the extent of going to the Nason Paint Company in San Francisco and trying to secure the color of paint we use, which is a little bit different than anybody else. Nason refused to sell them.

Q. Who was it that made the inquiry, do you know?

A. What inquiry?

Q. At Nason.

A. No, I don't. The salesman at Nason told me

(Testimony of Allan L. Rowland.)

that they were trying to buy paint from them; they said no, they were selling Nancy Ann, they couldn't do it; they would give them any other [254] color they wanted.

Q. There are many thousands of suppliers for materials for dressed dolls, isn't that so?

A. That's right.

Q. And they actively pursue their business in trying to sell the goods?

A. Yes, but not to competitors.

Q. In other words, one make of goods will sell only one account?

A. No, they won't sell one account, but a manufacturer of materials tries not to have any conflict with his materials. In other words, he will sell a dress account and doll house, or somebody making lingerie or something like that, so he won't have any direct conflicting; in other words, large diversification of customers is a lot better for the sales.

Q. That is true in men's clothing and women's clothing?

A. That is correct.

Q. In other words, that has always been the policy?

A. Yes.

Q. You don't recall or you don't know of any instance where the materials that Dollcraft used was the same material as used in your dolls?

A. No, but they are similar, confusing.

Q. And would you say that was true in reference to the Who Am I series? [255]

A. Yes, with the braids on them, on the material we use. It isn't a case of the braids; the materials—

(Testimony of Allan L. Rowland.)

it is a fact that there is a confusing—over all confusing similarity in the two dolls.

Q. Because they are both small?

A. They are both small; their origin was the same. The face is changed very little, and customers who were buying Storybook dolls, buying bisque dolls which were made formerly for Nancy Ann, were acquainted—they were acquainted with the features of the dolls, the characteristics of the dolls, and when this outfit started to make—Dollcraft started to make them, there was an over-all similarity that Mr. Patterson was able to sell the customers. It is just one of those things that is poor business ethics.

Q. In other words, that is what it was; it wasn't unfair?

A. We considered it unfair.

Q. As a matter of fact, I thought you testified yesterday that these dolls made by Mr. Hinz were unsatisfactory?

A. They were very much so.

Q. And isn't it a fact you said "Our molds"—isn't it a fact that those were Mr. Hinz's molds?

A. Mr. Hinz made the molds from our original mold; he didn't make the mold himself, by any means; he copied it from somebody else, and all his molds were made from a master mold given to him by somebody else. [256]

Q. But the investment and the making of these dolls for Hinz was the Hinz investment?

A. The investment was very small, compared to the sales.

Q. Whatever it was, it was all his?

(Testimony of Allan L. Rowland.)

A. Yes, sir; yes, sir.

Q. And you terminated that relationship rather abruptly, didn't you?

A. No, the termination of that association was leading up over a period of time. First of all, he couldn't get the deliveries the way we wanted them; we couldn't get the dolls the way we wanted them, and certainly we wouldn't go out and buy a plant in Stockton at the cost of thousands—twenty thousand—twenty-seven thousand dollars to make dolls if we didn't have to do it. We were forced to do it.

Q. As a matter of fact, you told Mr. Hinz that if he wouldn't make dolls exclusively for you, you would cancel the contract, didn't you?

A. No, sir, we did not; we never have; we are still doing business with somebody else.

Mr. Mellin: I beg the Court's pardon; I lost the letter.

Would you read the last question and answer?

(The reporter read the last question and answer.)

Q. Now, you are certain that is a fact?

A. Now that you mentioned the letter, I am not certain that it is a fact. [257]

Q. As a matter of fact, you wrote him a letter and told him that if he wouldn't manufacture dolls for you exclusively, you would cancel all present and future orders at that time?

A. I don't recall.

(Testimony of Allan L. Rowland.)

Q. You don't know now?

A. I don't recall, no, sir.

Q. I show you a letter dated July 7, 1945, on the letterhead of Nancy Ann Dressed Dolls, to "Myers Ceramics Products Company, Post Office Box 97, Santa Clara 29, California.

"Attention: Mr. Hinz.

"Dear Les:

"Unless we have a contract for your exclusive output on dolls, it will be necessary to cancel all present and future orders.

"We sincerely hope this will not be necessary.

"Very truly yours,

"A. L. ROWLAND."

Is that correct?

A. Yes, sir, that is correct.

Q. That refreshes your recollection, Mr. Rowland, doesn't it? A. Yes, sir, it does, yes.

Mr. Mellin: I will offer that letter in evidence as plaintiff's next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's 60 in evidence.

(Whereupon the letter referred to was marked Plaintiff's [258] Exhibit 60 in evidence.)

Q. (By Mr. Mellin): Now, as far as you know, then, up until the time that Mr. Hinz—by the way, the making of doll bodies, is a very small part of

(Testimony of Allan L. Rowland.)

Mr. Hinz, ceramic operations to your knowledge, isn't that correct? A. Very small.

Q. Up until the time that Mr. Hinz became associated with the Dollcraft Company in the middle of 1948 Mr. Hinz was in the undressed doll business and not in the dressed doll business, isn't that correct? A. To the best of my knowledge, yes.

Q. You cancelled your relations with Mr. Hinz in 1945, didn't you?

A. That is right, for a very definite reason, now that the letter has been revived.

Q. Now, you have the reason for the letter?

A. No, not a reason for the letter, but the statement of the reason for the letter.

Q. As a matter of fact, the reason for the letter was that Mr. Hinz had discovered that you folks were making an investment of thirty-five thousand dollars in cash to buy a ceramic plant to make your own doll bodies?

A. He knew we were buying that plant. We were forced to buy it; we were forced to spend \$27,000 because Mr. Hinz couldn't supply us with the product we wanted. [259]

Q. Is it your contention that the bisque dolls that are made here today by the plaintiff are the same as those dolls that you are making?

A. No; they are similar. They have been changed.

Q. All small doll bodies would be somewhat similar?

A. We are talking about the features.

(Testimony of Allan L. Rowland.)

Q. As a matter of fact, I can't tell the difference between the features of your plastic doll and any other doll; that must go to the expert.

A. The customer must be able to do it because the sales speak for themselves.

Q. There isn't anything secret or confidential as to who sells braids, trimmings and cloth goods that are used?

A. No, not at all.

Q. As far as your knowledge is concerned, Dollcraft or Mr. Hinz or anyone else did not purchase materials from any one of your sources, did they?

A. Not to my knowledge, no.

Q. And you testified that Mr. Kerr had more or less the run of the plant while he was employed?

A. Yes, sir.

Q. And there wasn't anything particularly confidential in the plant, was there?

A. Nothing particular; just the know-how of a few certain shortcuts and things of that type. [260]

Q. As a matter of fact, you used to take visitors through; and they would see as much of a secret character—could see—

A. No, visitors in the course of fifteen or twenty minutes in the plant do not observe what anybody who is in the plant would observe.

Q. Do you know of any facts which would lead you to believe that Mr. Kerr has used any of the knowledge at all which he gained at your plant?

A. No, sir.

Q. As a matter of fact, you heard Mr. Kerr testify that he had nothing to do with the material,

(Testimony of Allan L. Rowland.)

braids and trimmings used in dressing dolls at the Dollcraft, haven't you? A. That is correct.

Q. You know of no facts to the contrary, do you? A. No, sir, I do not.

Q. You also know, as a matter of fact, that Mr. Patterson is no longer selling dolls, is that correct?

A. No, I don't.

Q. Isn't it a fact that you tried to get Mr. Patterson in some sales capacity for dolls, as late as last year? A. Yes, sir.

Q. Now, with respect to Mr. Hinz, you heard counsel say that there was a concerted plan of action between Mr. Hinz, Mr. Kerr and Mr. Patterson to—here is what counsel said:

“There developed a plan of action involving Mr. [261] Patterson, Mr. Kerr and Mr. Hinz to avenge their wrongs at the hands of Nancy Ann at the expense of Nancy Ann.”

Would you tell us any facts that you might know which would support that statement?

A. Before Mr. Kerr left our organization—

Q. Go ahead.

A. Before Mr. Kerr left our organization he and Mr. Hinz were very chummy, and Mr. Kerr never left the organization because he was disgruntled at us; when he left there he had a proposition some place else.

Q. And what about anything that Mr. Hinz has done? A. Nothing.

Q. What about Mr. Patterson?

(Testimony of Allan L. Rowland.)

A. Just the three of them are disgruntled, that is all, and I think the record speaks for itself, inasmuch as supposedly the amount of money they were going to spend and commissions. Mr. Patterson was most open after him trying to make money out of anybody in the organization.

Q. He did a very marvelous job, didn't he?

A. Yes and no.

Q. Marvellous enough for you to offer him \$75,000 dollars a year last year?

A. We never offered him \$75,000.

Q. Or what would be equivalent to that?

A. No, sir, not the equivalent to it; not when anybody lends [262] his money back at ten per cent.

Q. What was confidential that you had told or disclosed to Mr. Hinz about the doll business?

A. Nothing at all. He isn't in the doll business. He knows how to make ceramics.

Q. In other words, he is a very practical workman, he personally, in that business?

A. I don't know anything about him; I guess so.

Q. Is this statement I just read of your counsel at this time based solely upon the fact that Kerr was your former shipping clerk; that Hinz was formerly supplying unfinished bodies and that Mr. Patterson formerly represented you as a manufacturer's agent?

A. It would appear that way on the face of it.

Q. That is about all your charges against these three men amount to?

A. That's right, and remarks made to the buyers

(Testimony of Allan L. Rowland.)

that I can't remember, that were carried back to us. Mr. Patterson spent most of his trips through the East talking about Nancy Ann, how he was mistreated, and so forth.

Q. There is an awful lot of gossip between buyers, isn't that a fact?

A. That's right, but the buyers passed it back to the manufacturers, because they didn't like it.

Q. You spoke of the sales of dolls by the defendant, and I [263] think that you said some—did you say ten million dollars worth or ten million dolls?

A. Ten million dolls.

Q. A considerably large portion of those were not dolls pertaining to fairyland and story-book characters, isn't that so?

A. The majority of them were.

Q. The majority of them were?

A. Yes, sir.

Q. What about the dolls here in issue? I mean that we are discussing—"Little Bo-Peep," "Little Miss Muffett," "Little Goldilocks," and what have you? What proportion of that total would they add up to?

A. They are very, very popular numbers in the line today. I think they will probably run about ten to one of the rest of the numbers in the series, those particular numbers you speak of.

Q. As to your total doll sales, they would run about 10 per cent?

A. No, they would run about 60 or 70 per cent—that is, in that particular series.

(Testimony of Allan L. Rowland.)

Q. You produced in 1947 what you called a package doll, in which you preprinted the bills?

A. Yes, sir.

Q. Now, I went through your list and I picked the numbers off [264] of here——

A. Yes.

Q. And out of 2660 some-odd dolls per order, approximately ten per cent were dolls that were involved in this issue leaving out the word "Story-book"; and I am talking about the particular names, named dolls descriptive names, "Bo-Peep" and what have you.

A. Yes.

Q. About ten per cent of them were those dolls that we have before us. Would that agree with your count?

A. No, Mr. Mellin, you only have part of the records there. In other words, they had a unit shipment; maybe that same store ordered a tremendous order. We could work out thirty-six units, very fast, quick, through our shipping department. We shipped them. As you saw the order for the May Company, it was \$50,000. Those ordered individually are only \$22,000.

Q. By the way, you said the largest doll order.

A. I said one of the largest orders in my opinion of miniature dolls.

Q. You mean Nancy Ann Dolls?

A. Miniature dolls, miniature dolls.

Q. You have no personal knowledge of the sales of the Alexander Doll Company?

A. Not individual orders, just plain dolls—miniature dolls.

(Testimony of Allan L. Rowland.)

Q. In other words, it is just your guess, your surmise? [265]

A. No, the May Company is probably one of the biggest purchasers in the country today. I have never heard of an order of that size before in the history of the business.

Q. I will hand you Exhibit E, and I ask you to check over that exhibit, and see if my figures are not correct, a little over ten per cent—I think out of 2600 dolls per order, there was somewhere in the neighborhood of 280 dolls, were of the dolls we are discussing here.

A. As I say, this particular order it may be that; but we are not shipping orders this way any more; we are not shipping units, we are shipping dolls by individual dolls.

Q. You didn't bring any invoices or other documents to substantiate that 60 per cent?

A. I got these out of the file, and whether or not there are other orders there I can not say.

Q. Every one of those orders was on file?

A. That's right, the 36 units.

Q. They were preprinted?

A. That is right.

Q. So that if someone wanted dolls they took them or else?

A. No, you are wrong. It was during the war they took them or else.

Q. This was during the year——

A. This was 1947; this wasn't during the war.

Q. As far as those orders were concerned, you

(Testimony of Allan L. Rowland.)

would say my [266] calculation of around 10 per cent would be approximately correct?

A. No, I wouldn't say it unless I sat down and checked it off.

Mr. Orr: I object to any such question. After all, all these dolls bear the word "Storybook" or "Story" so it could be roughly said that every one of them was included. If you want to narrow it down to any particular one of the minor marks, that can be done, as to a specific mark you want to investigate.

Mr. Mellin: I hand you Exhibit E——

Mr. Orr: It is a needless waste of time. The figures are in the record, and the percentage can be certainly established so far as the present question is concerned.

The Court: You might take that during the noon recess and go over it.

Mr. Mellin: O. K., your Honor.

Q. (By Mr. Mellin): Calling your attention to Exhibit 59, there is in controversy here, in addition, others, that the ones I am interested in are the ones I will give: "Mistress Mary"; No. 25.

A. The numbers have been changed since that time.

Q. What catalogue will we get these out of?

A. The 1947 catalogue.

Mr. Orr: I wish to offer a further objection that any tabulation made from a limited number of records of this kind [267] would be useless. There are so many thousands of other records and fluctuations

(Testimony of Allan L. Rowland.)

every week, so whatever figure he would arrive at would be meaningless.

Mr. Mellin: Then what was the purpose in introducing this?

Mr. Orr: To show that there was a tremendous sale of these dolls throughout the country.

Mr. Mellin: Well, the purpose of the cross-examination is to show that the tremendous purchases are due to a lot of other things than the particular dolls in question. I think it is proper cross-examination.

Mr. Orr: It seems to me it is a very needless waste of time and it doesn't conclude the fact.

The Court: You offered this. Now he has challenged it. He says it is only ten per cent.

Mr. Orr: He hasn't specified it as ten per cent.

The Court: You offered it. He has a right to examine on it.

Mr. Orr: At least as to one mark, it speaks for itself, that it involves only one of them.

The Court: He can't speak. You don't know whether it is ten per cent or forty.

Mr. Mellin: "Mistress Mary," No. 25; "Goldilocks," No. 28; "Little Red Riding Hood," 116; "Little Miss Muffett," 118; "Little Bo-Peep," 153; "Curly Locks," 154; "Sugar and Spice," [268] 158; "Little Miss Donnett," 163. And for your information the price list and the number are exactly alike as to the two lists, Mr. Rowland.

A. Well, it just happens to be. There was a lot of changes in the thing.

(Testimony of Allan L. Rowland.)

Q. I am confining it just to them. I would like to have you calculate in the noon hour the number of those dolls, of which there are——

A. Eight, I believe.

Q. Yes, and one more, "June Girl," No. 192. Just a moment. That is the wrong one here, 1947.

A. 192 is right.

Q. Is it 192? It says "Rosebud Girl."

A. "Rosebud Girl" is the same as "June."

Q. Is that the one you charged to be infringed by this bride one of those? A. Yes.

Mr. Orr: How about the mark "Fairyland"?

Mr. Mellin: I am not interested in those; I excluded "Fairyland," "Fairy Tales" and "Story-book."

Mr. Mellin: As a matter of fact, there is no indication on those, because those dolls are listed by number, aren't they?

A. Yes.

Q. And there is no indication number of any trade-mark, "Fairyland" or "Storybook" on them, is there? [269] A. No, sir.

Q. They are confined just to doll numbers with particular doll names; isn't that so? A. Yes.

Mr. Mellin: I ask that my request be confined to that.

Q. It wouldn't be a large task, would it? You only have to calculate on the first one and then multiply by the 29 invoices? A. Yes.

Q. With respect to the doll packages that the defendant and the plaintiff utilized for their dolls,

(Testimony of Allan L. Rowland.)

you don't contend that those packages were actually—are actually copied from anything that the defendant Nancy Ann Doll Company put out; the packages are distinctive, aren't they?

A. No, I disagree with you on that.

Q. In your opinion, they are not distinctive?

A. They are.

Q. They are distinctive? A. Yes.

Q. One is distinctive from the other?

A. No, they are very similar. The over-all picture is similarly confusing, for the simple reason that we have packaged dolls a certain way. We have put spreaders in the doll a certain way to hold the doll. We have put booklets in the boxes for the little girl. Everything is—the over-all picture is confusing to the child regardless of the color, [270] shape or matter; the idea is it was a small box, it is a small doll.

Q. Small box. You are not the first to put dolls in boxes, are you? A. No, I am not.

Q. For example, let's take part of them. You don't package your dolls in bottles?

A. No, I should say not.

Q. And you have no complaint about them putting the "By Dollcraft, Santa Clara, California," on them, have you?

A. No. The over-all similarity of the whole thing; that is the only thing we have any question about.

Q. And you don't complain of them using the cellophane lidded boxes, do you?

(Testimony of Allan L. Rowland.)

A. That is a similarity of the box and the doll and the booklets in the box.

Mr. Mellin: Now, may I have his deposition.

Q. I call your attention to your deposition of page 70, commencing on line 12:

“Q. Now, before recess we were discussing the similarity between the dolls put out by the plaintiff and the dolls put out by the defendant under the various names of fictional characters as designated in the pleadings, and inquired into the similarity and appearance of them, and I should like to ask you at this time, you do not contend [271] that there is any similarity in the appearance of the packages?”

“A. No, sir, I do not.”

Wasn't that question asked and that answer given?

A. That is correct; there is no similarity in the likeness of the boxes, but it is the over-all ideology that has been copied.

The Court: Over-all ideology. Will you spell that out, just what do you mean?

A. Well, the theory of Nancy Ann is to put out small Storybook dolls depicting characters of the nursery rhymes, certain nursery rhymes and certain Mother Goose series. We have packaged them a certain way. We have educated the child over a period of 13 years. We are putting out a miniature doll with a booklet in the box. Every one of these

(Testimony of Allan L. Rowland.)

outfits that come out and attempt to make some copy of the Nancy Ann dolls, the real reason for it is to try to package them with some similarity, not particularly as to color, but as to the general idea; and then the first thing that happens, they get the same kind of a booklet in the box. I appreciate that there is no law to stop them from putting booklets in, but it is the over-all ideology of Nancy's creation of Storybook characters. If we hadn't sold ten million dolls 90 per cent of these doll companies would probably never have started, because they wouldn't start——

The Court: There is a hundred million worth of materials [272] on the market, isn't there? This doll business has got to be a large business.

The Witness: It is about a three hundred and fifty million dollar business. Always has been—I think the doll business always has been large.

The Court: Somebody told me at the Emporium, one of the stores, that they have a window full.

The Witness: We have a special department in the Emporium.

The Court: I think they have them in the window.

Mr. Mellin: Yes.

The Court: I may say in passing, subject to change, that you gentlemen may get some idea of my personal state of mind, it looks like a free-for-all market.

Q. (By Mr. Mellin): Mr. Rowland, this idea, this general idea—very frankly, I am not clear on

(Testimony of Allan L. Rowland.)

what you mean by ideology, and I am not going into it; but isn't it a fact that at least as early, well, some time in the 1800's, they put out paper dolls, small paper dolls?

A. Mr. Mellin, that was before my time.

Q. I understand that, but you know from being in the doll business for fifteen years.

A. I told you before I had no interest in paper dolls; I know nothing about them, when they were put out or anything about them.

Q. I want to ask you if you are familiar with the fact that [273] there is a good deal of literature put out on dolls?

A. A great deal of literature; in what form do you mean?

Q. Well, doll collecting, doll making—there is a great deal on it, is that the fact?

A. People will write articles on anything.

Q. But you said that when it came to people that had anything to do with dolls yesterday you gave the Court the inference that the public generally, and those particularly in the doll business, that when they saw a "Goldilocks" or a "Little Red Riding Hood," that that meant Nancy Ann Dressed Dolls? Didn't you give that impression?

A. Yes, sir. Yes, I did.

Q. Let me read you this——

A. What are you reading from, please?

Q. I will tell you in a moment. "Cavalcade of Toys," by Ruth and Larry Freeman, that was copyrighted—a number of them, and this one was copy-

(Testimony of Allan L. Rowland.)

righted in 1942, this one here, and others antedating it. It is offered to show what the contemporaneous literature thinks of Nancy Ann dolls as being exclusive:

“Long ago, just as now, dolls were named for noted celebrities. Besides ‘Jenny Lind, the Swedish Nightingale,’ there were ‘General and Mrs. Tom Thumb,’ ‘Commodore Nutt’ and ‘Minnie and Warren’ (P. T. Barnum’s famous circus midgets); ‘Little Red Riding [274] Hood,’ ‘Little Miss Muffett’ and others from Mother Goose Rhymes, as well as ‘Madame Pompadour’ and many French court favorites; dolls of American patriotic design were also common.”

You knew of that, didn’t you?

A. Yes, but they were never registered marks.

Q. They didn’t bother to register them; that is the difference? A. That is right.

Mr. Mellin: I am going to offer the page in that book.

Mr. Orr: I am going to object to it.

Mr. Mellin: Let me offer it first. “Cavalcade of Toys” by Ruth and Larry Freeman, it came from the library of the University of California. It was copyrighted in 1942 by Ruth and Larry Freeman, all rights reserved. I am not offering it, your Honor, to prove prior adoption of any trade-marks of those dolls, but merely to show that in contemporaneous literature Nancy Ann is not given any

(Testimony of Allan L. Rowland.)

credit for exclusive ideology or small dolls named for nursery rhyme characters, and I am certain that it is admissible on that point, your Honor.

Mr. Orr: I object to it on the ground the publication itself is no evidence of what the fact is; it is merely the impression of that particular author and has no probative value in this proceeding whatsoever.

Mr. Mellin: That is exactly the point; that is the opinion [275] of people. He said everybody thought when they saw a doll named "Red Riding Hood" it was their doll. This author doesn't. It is for that limited purpose.

The Court: The objection will have to be sustained.

Q. (By Mr. Mellin): Speaking of yesterday, you said that before you trade-marked these names that you made a very careful investigation to determine whether they had been used before. Did that investigation include the contemporaneous literature at the time?

A. That will have to be referred to the counsel, for the simple reason we instructed him to go ahead and make the search.

Q. In other words, then,—

A. That type of literature, we don't even know who those people are. So, as I said before, anybody can write an article on anything.

Q. You didn't go through the literature at the time you adopted these names?

(Testimony of Allan L. Rowland.)

A. I did not, no, because in looking that matter up——

Q. Didn't you make a search?

A. I instructed counsel to make a search.

Q. The search you instructed him to make was a routine search made through Patent Office records?

A. That is right.

Q. That is a search made to determine as to whether the names were available? [276]

A. That is to the best of my knowledge.

Q. The availability there was the availability as far as the records of the Patent Office was concerned? Whether they were registerable or had been registered previously?

A. That is correct; that is the interest we had in them.

Q. The search you spoke of, outside of that, was not carried through the literature to determine, for example, whether dolls carrying the name of "Little Red Riding Hood" had been put out before, but merely whether you could register it?

A. Mr. Mellin, for your information, there were no small dolls on the market until Nancy Ann, except those brought into being by her, so when we are talking about a doll here we are talking about small dolls. That book refers to dolls; it never said—they didn't know about miniature dolls in the 1800's, they didn't have miniature dolls. They didn't have such miniature dolls at that time such as Nancy Ann has, to the best of our ability to look for them in the search.

(Testimony of Allan L. Rowland.)

Q. As a matter of fact, you imported these dolls from Japan originally?

A. They were miniature dolls; they were just a piece of material. I am talking about miniature Mother Goose, nursery rhymes and dolls of that character.

Q. Do you mean to tell me that you believe that your trade-marks are invalid as to large dolls but valid as to small dolls?

A. Well, we have always considered it as such. We were only [277] interested in miniature dolls.

Q. In other words, then, would you say that a doll which is not a small doll, but let us say a ten-inch doll would be open to anybody, although it is a "Red Riding Hood"?

A. There is no designation in the Patent Office as to the size of a large doll.

Q. As a matter of fact, there is no designation as to material, is there? Dolls are dolls like pigs is pigs?

A. I don't believe there is any designation as to material.

The Court: We will take an adjournment now until 2:00.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.) [278]

Wednesday, August 23, 1950—2:00 P.M.

ALLAN L. ROWLAND

resumed the stand in behalf of the defendant.

Cross-Examination

(Continued)

By Mr. Mellin:

Q. And the result of your computation, Mr. Rowland? A. On the specified numbers?

Q. Yes.

A. Namely, nine dolls. It amounts to 12 per cent of our total volume.

Q. Thank you, sir.

A. But the rest of the numbers all fit in the same series, and these numbers are part and parcel of the "Nursery Rhymes" series, "Fairylane" series and "Mother Goose" series, and that amounts to 64 per cent of our volume, and the "Storybook" name, which is in question, to amount to 100 per cent of the volume.

Q. And approximately the time that you were to cancel or stop buying doll bodies, raw, unfinished doll bodies from Mr. Hinz—and by the way, those bodies were copied substantially from the Japanese dolls, weren't they, that originally came in?

A. No, sir.

Q. They were ordinary bisque doll bodies?

A. Yes.

Q. Now, at about the time that you had decided to purchase [279] further doll bodies from Mr. Hinz, did you tell Mr. Hinz at any time to put "Patent Applied For" on those doll bodies?

(Testimony of Allan L. Rowland.)

A. I believe we did, on the advice of our counsel.

Q. And did you have patent applications on those doll bodies?

A. I am pretty sure we did, or else we wouldn't have told him that.

Q. During the taking of your deposition, you said to your knowledge you had filed an application for a patent on those doll bodies, isn't that so?

A. Yes.

Q. You were asked to produce it and you did not produce it. Am I correct in assuming that when you did not produce it would indicate that there wasn't any such application?

Mr. Orr: I might state for the record that I made a search for the application, and I learned the docket had been destroyed because the application had been rejected and no appeal was taken. It was destroyed along with other old documents. Such an application was filed, I will state, by myself.

Q. (By Mr. Mellin): These doll bodies—you originally bought bisque doll bodies from Japan?

A. Yes.

Q. When that source was exhausted, the doll bodies were made by the Merritt Manufacturing Company in Oakland?

A. The source was never exhausted.

Q. The Japanese source was never [280] exhausted? A. No, sir.

Q. You still bought them during the war?

(Testimony of Allan L. Rowland.)

A. No, we didn't choose to.

Q. You started to buy them from Merritt, who made them from your own molds? A. Yes.

Q. Merritt made molds from the Japanese bodies, didn't he?

A. No, they made molds from a model Nancy Ann made up.

Mr. Mellin: No further questions, your Honor.

Redirect Examination

By Mr. Orr:

Q. You were questioned at some length this morning in regard to the similarities or dissimilarities in the boxes in which these various dolls have been packed. Is it your testimony that there is similarity in detail or that the similarity is in the general scheme of packaging?

A. The similarity is in the general over-all picture.

Q. Among your various trade-marks which are included here, which have been discussed at various lengths, which do you regard as your most important mark? A. "Storybook Dolls."

Q. Among the marks which have been charged with infringement, which is the mark that you regard as the principal infringement?

A. The "Dolls With a Story," because that is so similar: It means the same thing as "Storybook Doll."

Q. With reference to the use of names such as "Sugar and [281] Spice" and "Little Bo-Peep,"

(Testimony of Allan L. Rowland.)

is it your position that you own a property right in those names as applied to all products or merely as applied to dolls?

A. Just as applied to dolls.

Q. In general, is it your position that you are the exclusive or should be granted the exclusive rights to manufacture little dressed dolls, or do you recognize that every one is entitled to make little dressed dolls?

A. We recognize the fact that anybody can make a dressed doll; the only thing we are particularly interested in is the dolls' names that we have registered in the United States Patent Office.

Mr. Orr: No further questions.

Mr. Mellin: No questions, your Honor.

Mr. Orr: I would like to call Miss Nancy Abbott.

NANCY ANN ABBOTT

called for the defendant; sworn.

The Clerk: Would you state your name?

A. Nancy Ann Abbott.

Mr. Orr: I realize your Honor is becoming a little bored with this trial and anxious for us to conclude. I will do the best I can; but in spite of the time that it takes, I feel that the interests of these parties are very important and that I will be failing in my duty if I fail to bring out the points [282] which I think are essential to the final determination of the case.

The Court: If you are not here to annoy me, some other attorney will be here.

(Testimony of Nancy Ann Abbott.)

Mr. Orr: I hope that I am not annoying you.

The Court: It was indicated that this case would take two days; you are in the third day.

Mr. Orr: I am afraid that patent lawyers are habitually inclined to under-estimate the time.

The Court: All right.

Mr. Orr: I will have to plead guilty of being one of those.

Direct Examination

By Mr. Orr:

Q. You are the president of Nancy Ann Storybook Dolls Company? A. That's right.

Q. Incidentally, are you married? A. No.

Q. Have you ever been married?

A. Yes, once.

Q. When was that? A. In 1942.

Q. How long did that marriage last?

A. Three months.

Q. Then the comment about one of your husbands was a little bit out of line this morning, was it? [283] A. Yes.

The Court: What was that?

Mr. Orr: The answer was "Yes."

The Court: What?

Mr. Orr: The comment made this morning that the buyer for the City of Paris had been one of her husbands was a little bit out of line.

The Court: Oh.

Mr. Orr: And her answer was "Yes."

The Court: It isn't out of place or it isn't

(Testimony of Nancy Ann Abbott.)

uncommon to have a half a dozen marriages nowadays.

Mr. Orr: This is one of the exceptional cases where there was only one of very short duration.

Q. Will you, in your own words, Miss Abbott, explain to the Court how you got into the business of making little dressed dolls and how you have developed that business?

A. Well, it started originally as a hobby, and people thought that I should commercialize them, but my first trial was a sad experience; nobody wanted them. So after about six months I tried again, and they still didn't want them; they thought that anybody that offered them this size (indicating) for the same price as one of this size (indicating) was just crazy.

Mr. Orr: Let the record note that she was indicating a range of six inches in the first gesture and one of two feet or so in the second [284] gesture.

A. So bit by bit, though, they did get—I mean, they bought small orders at first, and when we went into business and incorporated in 1937. I went to New York to the Toy Fair and buyers saw them there, were not inclined to buy, but they bought a few. And then the following year they bought a little bit more and it just then began to catch on.

Q. At the time you began the enterprise, was there a supply of little dressed dolls available on the market? A. No, there was not.

The Court: What year was this?

(Testimony of Nancy Ann Abbott.)

A. 1937. Actually I started in 1935 but we incorporated in 1937. And my idea behind them—I have always been very fond of fairy tales and my idea behind them was to create a little family of dolls that children could collect, because I had always wanted something like that myself when I was a child, and it just wasn't available. So that was the actual start of the thing.

Q. (By Mr. Orr): From the start that you made then in 1937 you have built up your business which in the past 14 years has totalled something approaching ten million? A. That's right.

Q. About how many dolls did you have in your line when you first began?

A. Well, I am not sure about the first year, but around that time we had 125 in the line, and the line was a little too big; [285] it took too long to produce them with the amount of help we had, so we cut it down a little to about somewhere around 80 numbers. Just when that happened I don't know.

Q. At the very start——

A. Each year the whole line has been entirely redressed, so that there are 100 new numbers each year.

Q. In other words, the doll which is put out as "Sugar and Spice" this year is not necessarily dressed the same as the one put out last year?

A. No, it wouldn't even resemble it.

Q. Then the patterns change from year to year?

A. That is right, every year.

(Testimony of Nancy Ann Abbott.)

Q. Does that apply through the various dolls in the line? A. That is right.

Q. So that as to the "Sugar and Spice" doll which is identified by the name "Sugar and Spice" this year, it isn't the same as your "Sugar and Spice" last year? A. No.

Q. That is, it hasn't the same costume?

A. There has been maybe once before we carried a doll which was "One, Two, Button My Shoe"—everybody thought she was so cute we kept her.

Q. In other words, these various names, "Sugar and Spice," "Curly Locks," "Goldilocks" were applied to a succession of dolls? [286]

A. That is right.

Q. Which have been devised from year to year during the period you have been in business?

A. That is right.

Q. And throughout the length of your business you have used those constantly upon dolls of the general type that you have made popular?

A. Yes.

Q. In selecting the various names that you have appropriated as trade-marks for these dolls, did you make any research or study of any kind?

A. Yes, I did. As a matter of fact, I have gone a great deal into research on fairy tales and nursery rhymes. The background of most nursery rhymes are political.

Q. By that what do you mean?

A. Well, for instance, "Curly Locks," which we and many of our imitators have made a little

(Testimony of Nancy Ann Abbott.)

girl, is actually Bonny Prince Charlie. It isn't a girl.

Q. A little boy in the first place? A. Yes.

Q. Are there any other instances of that kind?

A. "Little Betty Blue" is Queen Elizabeth. There is a Betty Blue in England where she took her shoe off and couldn't find it again.

Q. Among the dolls which you have put out, are there any of [287] them named for characters of your own creation?

A. That is right. I have written quite a few nursery rhymes myself and they appear among the dolls.

Q. Did you in your research among the nursery rhymes ever find a character known as "Sugar and Spice?"

A. There is a nursery rhyme on Sugar and Spice and everything nice.

Q. Is there any individual named Sugar and Spice? A. No, it is just a little rhyme.

Q. So there has never been such a nursery character known as Sugar and Spice?

A. It is just the first words of the rhyme.

Q. Do you feel that you and your organization are entitled to the exclusive right to use nursery rhymes or the names of characters from nursery tales or from story books in general?

A. Well, I actually feel that the ones I have created and created a tremendous demand for over a period of years, that I ought to be protected somehow on them. I have made them popular.

(Testimony of Nancy Ann Abbott.)

Q. Those that you have used? A. Yes.

Q. You have no objection to others making other dolls and using other names, have you?

A. Not at all.

Q. From the time you began putting out these dolls, what [288] has been your policy with regard to the selection and the protection of the names that you have applied to them? Have you made any effort to avoid selection of names in use?

A. Well, yes; if I thought that somebody else was using the name, I mean, all he had to do was tell me so, because I wouldn't want to use the same name.

Q. Have you encountered any instance of that kind?

A. Yes, with Adam George, who was a representative of Madame Johnson, told me at the Toy Fair in 1942 that they were using "Alice in Wonderland" and they wished I wouldn't use it, so I didn't.

Q. What did you do following that?

A. We discarded that.

Q. And adopted another name in its stead?

A. Yes.

Q. What do you regard as to the proportion of names that you have selected and used on the trademarks to the number of names that are available for story-book and fairyland characters?

A. Well, I wouldn't be able to guess, but there is a book called "One Thousand Mother Goose

(Testimony of Nancy Ann Abbott.)

Rhymes." There are plenty in it that I haven't used.

Mr. Orr: No further questions.

Cross-Examination

By Mr. Mellin:

Q. Miss Abbott, I didn't mean to humiliate or embarrass you at all this morning; it was [289] just——

A. I am very glad about that, Mr. Mellin.

Q. It was just an unfortunate choice of words; I didn't do it intentionally; I was just advised that he had been your husband, and I unfortunately chose "one of your husbands."

From time to time as you have changed these doll characters, some of them approached more or less to the well-known characteristics of the dolls, didn't they, in the early days of your making of these dolls?

A. Mr. Mellin, I don't think there are any characteristics of the dolls, because there are so many versions of what they may look like that I wouldn't take an artist's viewpoint of it.

Q. For example, we will take Little Bo-Peep. She is ordinarily associated with a crook, isn't she?

A. We don't put a crook on her.

Q. I show you a doll which I have been assured is a Nancy Ann "Little Bo-Peep." Isn't that one of your creations?

A. Yes, it is. Originally we did put a crook on it, but this box here shows the doll without it.

(Testimony of Nancy Ann Abbott.)

Q. I appreciate that. It is one of your earlier dolls?
A. Yes, they have improved since.

Q. So from time to time, and particularly in the earlier days, some of the dolls had those characteristics which some of them recognized from the nursery rhymes; isn't that true?

A. You could hardly say a crook was typical of Little Bo-Peep. After all, she did tend sheep, we know that from the rhyme. [290]

Q. Yes.

A. But she don't necessarily have to have a crook. We have gone more with the little felt hat that is typical of that period than we have of the crook.

Mr. Mellin: No further questions.

Redirect Examination

By Mr. Orr:

Q. Just one further question. I believe it has been testified in the proceedings here that some of your products have been shipped abroad to England. Do you have any information as to where any of those dolls ultimately wound up?

A. Well, at the Toy Fair, this was the year before the war, Mr. Davis, buyer from Harridge's, came over and he bought about \$800 worth, but we were worried because he had to pay 52 per cent duty. So the following year when he came back I was inclined to lose hope. Anyhow, I asked him how he did with them. He said, "Oh, we not only

(Testimony of Nancy Ann Abbott.)

did very well, we have had two royal appearances, each for a collection." So he was quite happy with them. But the war came along then and he couldn't buy. Our hair comes from England.

Q. What is the situation with respect to the purchase of hair that you were discussing?

A. Hair originally comes from around Bulgaria. It is very long hair, and it gets to England as the center for cleaned hair, and they deliver it all over the world. We didn't lose any shipments. [291]

Q. Have you had any information in regard to efforts on the part of Messrs. Kerr and Hinz to secure supplies from that same source?

A. Mr. Harridge, who represents our particular factory in England, called us and said that Mr. Patterson was trying to get hold of the hair for these two people, but that he would protect us and not sell it to them.

Mr. Orr: No further questions. That is all.

I would like to recall Mr. Juster.

MAURICE JUSTER

recalled for further recross-examination.

By Mr. Orr:

Q. When you made your arrangements with Mr. Kerr and Mr. Hinz to form the corporation Dollcraft, who made the suggestion that you move the plant to Santa Clara?

A. I think it was Mr. Hinz.

Q. And who——

(Testimony of Maurice Juster.)

A. Wait a minute. He asked me if I had any objection to moving my plant and my family down the Peninsula, and I talked it over with my wife and it turned out that we both wanted to live down the Peninsula for a long time, and it would be nearer the source of supply of the dolls and better for the children, we thought, to live in the country than in the city, so we decided on the move that way.

Q. It was Mr. Hinz's suggestion then? [292]

A. Well, he didn't—

Q. His invitation, then, we will make it.

A. Wait; you asked me if it was—pardon me, what, Mr. Orr?

Mr. Orr: Will you read the question, please?

(Last question read.)

A. He didn't invite me, no. He first asked me if we had any objection to moving down to Santa Clara, and after talking it over for a few minutes, why, we had no objection whatsoever.

Q. Who determined what space was to be occupied by your organization in the plant of the Myers Ceramic Products Company?

A. He asked me how much space I needed.

Q. Who indicated the position within the plant which you were to occupy?

A. After Elise and I decided on how much space, why, he looked around the plant to find the best suitable location that would do for it and we got it.

(Testimony of Maurice Juster.)

Q. Was that your selection or Mr. Hinz?

A. It was mutual.

Q. Who determined the amount of rent that was to be paid?

A. The landlord; it was Mr. Hinz.

Q. Did you buy any new equipment when you went into the new plant? A. Yes.

Q. Where did you purchase that?

A. Most of it had to be made. [293]

Q. Who determined what equipment was to be used?

A. He asked me what equipment I needed.

Q. And then who purchased it?

A. Dollcraft Company.

Q. What individual attended to the purchase?

A. Being as I was new and Mr. Hinz was well established down there, he knew the best source to go to have it done.

Q. So Mr. Hinz did? A. Yes.

Q. Who guaranteed the payment?

A. I don't even know whether that question ever came up.

Q. Do you know who planned the plant layout, the arrangement of the machinery that you installed there? A. I did the arranging.

Q. Do you at the present time produce dolls with an unbreakable body? A. With a what?

Q. With unbreakable bodies. A. No.

Q. Do you produce dolls with movable eyes?

A. No.

(Testimony of Maurice Juster.)

Q. Have you noticed any difference in the salability of your product during the last few months because of the absence of those features?

A. We are selling more dolls in the last three months than we [294] did in the first six months.

Q. How about the six months immediately preceding this last six months, the first six months of the last year?

A. I think each year we are selling more dolls.

Q. How many employees do you have employed at the present time?

A. At the present time, seven plus contract labor.

Q. And do you have any salesmen on the road at the present time? A. Yes.

Q. How many? A. Two.

Mr. Orr: That will be all.

Further Redirect Examination

By Mr. Mellin:

Q. Just a minute, Mr. Juster. At any time did Mr. Kerr or Mr. Hinz offer or give or discuss with you the purchase of the materials for dressing these dolls? A. Never.

Q. Who decides that?

A. Elise and I decide what materials are to be bought.

Q. And you are both salaried employees of Dollcraft, that is, in the sense you both draw salary?

A. Yes.

Q. In addition to your stock ownership?

(Testimony of Maurice Juster.)

A. Yes. [295]

Q. Do Mr. Kerr and Mr. Hinz? A. No.

Mr. Mellin: That is all.

Further Recross-Examination

By Mr. Orr:

Q. You mentioned using contract labor. Will you explain briefly what you mean by contract labor?

A. We have certain articles sewed outside the plant.

Q. Piece work outside of the plant, is that it?

A. No, it isn't piece work, so much per gross. That isn't piece work. Piece work is something else. Piece work could be slave, sweat shop stuff.

Q. Gross work then? A. That is right.

Mr. Orr: That is all.

Mr. Mellin: That is all.

Mr. Orr: Mr. Kerr, please.

ROBERT E. KERR

called by the defendant under Rule 43(b); sworn.

The Clerk: Would you state your name to the Court?

A. Robert Edward Kerr.

Direct Examination

By Mr. Orr:

Q. What is your address?

A. 49 North River Street, San Jose.

(Testimony of Robert E. Kerr.)

Q. What is your occupation? [296]

A. I am a manufacturer of undressed bisque dolls.

Q. You are the party who is named as plaintiff and cross-defendant in this action?

Mr. Mellin: Just a moment; not plaintiff; cross-defendant.

Q. (By Mr. Orr): Cross-defendant?

A. Yes, sir.

Q. Were you formerly employed by the Nancy Ann Doll organization? A. Yes, sir.

Q. For how long a period were you employed there?

A. From 1939 until the beginning of 1945.

Q. Will you state briefly what your duties were during that period?

A. Well, I started out as an order checker; in other words, I filled the orders as they were sent out from the office and—that is, with the particular dolls that were called for by the order and I checked them and I packed them in cartons and shipped them. So I guess I would be technically a shipping clerk, I mean, if there is any such classification.

Q. Did you in your position or during your employment have occasion to check orders of goods as they came in, materials as they came in?

A. Yes, I also acted as receiving clerk and checked the merchandise that came in.

Q. Did you have an opportunity to observe the general course [297] of business and the manner that it was conducted?

(Testimony of Robert E. Kerr.)

A. I would say that I did.

Q. Had you prior to the time you went to work for the Nancy Ann Doll organization had any experience in the business of manufacturing and selling dolls?

A. No, sir.

Q. When did you become acquainted with Mr. Hinz?

A. I would suppose our acquaintanceship goes back to 1941, about the time that he started to make dolls for Nancy Ann Doll Company.

Q. Your acquaintance with Mr. Hinz was through the Nancy Ann organization, was it?

A. Yes, because he made dolls for them and he delivered them a lot of times himself because the idea, he was trying to help them all he could; he brought the dolls up in his own car.

Q. You became acquainted with him while you were employed by the Nancy Ann organization?

A. Yes, that's right.

Q. As a result of your employment by Nancy Ann?

A. Yes, I would say that is true.

Q. Are you acquainted with Mr. Patterson?

A. Yes.

Q. When did you become acquainted with him?

A. He also worked for the Nancy Ann Doll Company.

Q. And was your acquaintance with him as a result of your [298] employment by the same employer?

A. Yes.

Q. Was Mr. Patterson acting as selling agent

(Testimony of Robert E. Kerr.)

for Mr. Hinz before you formed the partnership Kerr & Hinz? A. Would you read that?

Mr. Orr: Read the question.

(Reporter read the question.)

A. I doubt if Mr. Hinz even knew Mr. Patterson; I am not sure about that. You would have to ask him.

Q. Mr. Patterson did act as a selling agent for Kerr & Hinz in their activities? A. Yes.

Q. When did he begin representing them in the sale of your products?

A. He started with us in 1945 when we went into business and continued with us until, I think it was the end of 1948.

Q. He began immediately upon the formation of your partnership? A. Oh, yes.

Q. Has Mr. Patterson also acted as selling agent for the Dollcraft Company?

A. Well, I have a general knowledge of that, yes, that he did.

Q. Do you know when he began representing them in a selling capacity?

A. No, I wouldn't because that was—I think he started in the [299] partnership before I knew—in fact, he was selling for us and he sold the original dolls to the Dollcraft Company, you see, because they were one of the manufacturers of dressed dolls and naturally we were selling undressed dolls and that was his business, to sell them.

Q. I am asking you, when did he begin? Or do

(Testimony of Robert E. Kerr.)

you know when he began selling dolls that were dressed by Dollcraft Company?

A. Company or corporation?

Q. Corporation.

A. Well, he was with them when they became a corporation, and he continued.

Q. He had been selling——

A. He was with them as a partnership and continued in the corporation, yes.

Q. In your discussions about forming the corporation Dollcraft Company, Inc., was there any discussion of Mr. Patterson becoming a stockholder in that organization, to your knowledge?

A. No, sir.

Q. After the Dollcraft organization got into production as a corporation, who suggested the application of various names to the dolls which had previously been issued only as "Who Am I"?

A. Our customers.

Q. Who among your own organization at your policy directing meeting? Which of you individual interested parties made the suggestion that your customers' suggestion be adopted? [300]

A. Well, Mr. Hinz.

Q. When you became interested in the doll company, you were aware of the names and trademarks which had been used by the Nancy Ann organization, were you not? A. Yes, sir.

Q. And you recognized that some of those which were being applied to the "Who Am I" Series were

(Testimony of Robert E. Kerr.)

the same marks which had been applied years before by Nancy Ann, didn't you? A. Yes.

Q. Did you offer any objection to the use of those names as infringing upon the rights of your former employer?

A. Well, the chances are—of course, this would be just a guess; the chances are I expressed the opinion that "Little Red Riding Hood" was "Little Red Riding Hood"; that is all it was and nobody could own it.

Q. How about "Sugar and Spice"?

A. I think that went all the way down the line.

Q. You applied that same theory to all of the marks? A. I think so.

Q. And also to story book—

Mr. Mellin: Just a moment. There is no showing here that we ever used the word "story book" as a matter of fact.

A. No, we never used the word "story book."

Q. (By Mr. Orr): How about "Dolls With a Story"?

A. It would be more of an indication of what kind of dolls [301] they were.

Q. Whose suggestion was it that you adopted "Dolls With a Story" as a trade-mark?

Mr. Mellin: If your Honor please, I am not sure that it is a trade-mark.

The Witness: It is not.

Mr. Mellin: He used it on the bottles or on the packages, but I am not certain it is a trade-mark or capable of being a trade-mark.

(Testimony of Robert E. Kerr.)

Q. (By Mr. Orr): As a designation, we will call it then, without being technical, or slogan, rather—as a designation or as a slogan as a mark to be applied to the containers for dolls.

A. Gosh, I don't know who suggested it; I imagine it was a combination of everybody talking it over, you see, at a policy meeting.

Q. It was a name or a mark that was selected at one of the policy meetings at which you and Mr. Hinz and Mr. Juster and perhaps others were present?

A. I think Mr. Mellin is right; it isn't a mark or name; it is more or less a slogan and description of the merchandise we make.

Q. We are not trying to determine its character; we are trying to determine how and when it was adopted?

A. When was it adopted? [302]

Q. Yes.

A. It seems to me it was in 1949; in the fall of 1949, I would say.

Q. And it was selected at a policy meeting of the directors of Dollcraft Company, is that correct?

A. To be perfectly honest with you, I don't know, but I am assuming that is how it was done. That would be the natural way for it to happen.

Q. And before it would be adopted, it would have to be approved by the directors, would it not?

A. I should think that it would be, yes.

Q. And you were one of the directors?

A. That is right.

(Testimony of Robert E. Kerr.)

Q. And do recall having approved the adoption of that mark? A. Yes.

Q. And at the time you adopted that you were aware that Nancy Ann Storybook Dolls, Inc., had been for years using the trade-mark "Storybook"?

A. Yes. I don't see any similarity.

Mr. Orr: That is all.

Cross-Examination

By Mr. Mellin:

Q. Mr. Kerr, you have been in Court while the testimony was taken here, haven't you?

A. Yes, sir.

Q. And there was some inference left by Mr. Rowland that you [303] may have used some of the addresses of supplies of doll dress material to their detriment in some fashion. Were you ever consulted with respect to what sources of supply the Dollcraft Company should buy their braids and trimmings for the dolls? A. No.

Q. Do you know anything about it?

A. Frankly, no.

Mr. Mellin: That is all.

Redirect Examination

By Mr. Orr:

Q. One other question: In your sale of finished and undressed doll bodies, do you sell them to other manufacturers who put out dressed dolls?

A. A great many of them, sir.

(Testimony of Robert E. Kerr.)

Q. Do those other manufacturers make the same line of dolls that Dollcraft Company does?

A. If they did, it would be purely accidental; I mean, I don't even know what they put out.

Mr. Orr: That is all.

The Witness: Some of them are a long way off.

Recross-Examination

By Mr. Mellin:

Q. By the way, when did you go into partnership with Mr. Hinz? A. In 1945.

Q. That was after you left the Nancy Ann Dressed Dolls?

A. Yes, sir, several months. [304]

Q. What business did you go into in partnership with Mr. Hinz?

A. Manufacturing unfinished bisque dolls.

Q. Did you make any dressed dolls at all?

A. No.

Q. The raw material, that is, the freshly made doll body, came from Myers Ceramic Company, did it? A. Yes.

Q. That is owned by Mr. Hinz?

A. That is right.

Q. And then Kerr & Hinz would get those dolls from the kilns? A. That is right.

Q. What would you do to them?

A. We processed them; in other words, we finished them; they were fired bisque, and we decorated them and finished them so that they were in a state that they could be dressed, in other words,

(Testimony of Robert E. Kerr.)

finished off with hats and dresses and shoes or anything else that they wanted to do to them.

Q. In other words, when you get through with them, they had hair, were painted——

A. Yes, decorated; their features painted on, eyes, lips, nose and cheeks and so forth.

Q. When did you get into the corporation, Dollcraft Company?

A. When it was formed in 1948.

Q. Between 1945 and 1948 you were continuously selling [305] undressed dolls? A. Yes.

Q. What proportion of those undressed dolls did you sell to Dollcraft during that period of your total production?

A. I would say a very small percentage, I mean, I would have to guess at it—five per cent.

Q. What about recently? During the last year, let us say, what percentage would you say?

A. Oh, maybe 20 or 30.

Q. 20 or 30 per cent of your total output?

A. Yes. In other words, as Mr. Juster just said, continued growing a little bit. As they do, they use more dolls.

Q. And all the other dolls that you made were sold to other people for dressing and making little dressed dolls?

A. That is right. We sell them to department stores for resale to people that want to dress them. We sell them to other doll dressers and we—for instance, we sell them to bazaars and festivals who want to dress them. We have many hundreds of

(Testimony of Robert E. Kerr.)

kinds of festivals and bazaars, that they dress them and then they have a bazaar and sell them to make money out of them.

Q. Other than these policy meetings, do you take any active part in Dollcraft Company?

A. No.

Mr. Mellin: That is all. [306]

Further Redirect Examination

By Mr. Orr:

Q. I would like to ask another question. Among these decorated doll bodies, that is, the dolls that have been painted and their features painted, I guess? A. Yes.

Q. Do you know of any of your other customers that dress those and sell them as fairyland dolls?

A. I don't know that any do and I don't know that any don't. I don't now.

Q. How about "Red Riding Hood"?

A. I don't know.

Q. "Little Miss Muffett."

A. I don't know.

Q. With respect to any of the names involved in this proceeding, do you know of any of your other customers who dress and sell the dolls produced by you and sold to them under names the same or closely similar to those involved in this proceeding?

A. I would have no way of knowing. They buy the dolls from me; what they do with them isn't my business.

(Testimony of Lester F. Hinz.)

Q. Anyway, dolls in which you are personally interested? A. I could still be outvoted.

Mr. Orr: That is all. Mr. Hinz.

LESTER F. HINZ

called under Rule 43(b) by the defendant; [307]
sworn.

The Clerk: Would you state your name to the Court, please?

A. Lester F. Hinz.

Direct Examination

By Mr. Orr:

Q. What is your address, Mr. Hinz?

A. Route 1, Box 492, Los Gatos, California.

Q. And what is your occupation—your primary occupation?

A. I am a manufacturer of dolls and ceramic products.

Q. What is the name of the plant which you operate?

A. Myers Ceramic Products Company.

Q. Are you the sole owner of that?

A. Yes, sir.

Q. Are you also interested in the firm of Kerr & Hinz? A. I am a partner.

Q. And have you been a partner from the inception of that partnership? A. Yes, sir.

Q. What is the business of that partnership?

A. They process dolls. They take them in the

(Testimony of Lester F. Hinz.)

raw and they paint them and decroate them and sell them.

Q. To whom do they sell him?

A. Kerr & Hinz sell dolls to lots of people.

Q. Without reference to the particular name, but to the type of purchaser, and type of business to whom they are sold?

A. Well, Mr. Kerr listed those. They sell them to doll [308] dressers, they sell them to department stores, and they sell them to variety stores and they sell them to guilds and various organizations that dress them and resell them.

The Court: You sell them to anyone who buys?

A. That's right.

Q. (By Mr. Orr): Do you also have an interest in the Dollcraft Company that is a party to this suit?

A. Yes, sir.

Q. What is your interest there?

A. I am a stockholder and president of the corporation.

The Court: What?

A. Stockholder and president of the corporation.

Q. What corporation?

A. The Dollcraft Corporation.

Q. (By Mr. Orr): How long have you been connected with the doll business?

A. Since 1941.

Q. When and how did you first become interested in the doll business?

A. You want the whole story?

Q. Just briefly.

(Testimony of Lester F. Hinz.)

The Court: Yes, tell us the whole story.

A. I—a gentleman that I had never saw before entered my plant with a little doll and asked me if I could make those bodies, and I said yes, I could. He told me his name was Fred [309] Anderson and that he was a partner in the Nancy Ann Doll Company and they needed these doll bodies very badly. And if I recall, at that time I told him that I wasn't interested in making the dolls. And he came back again and asked me if I wouldn't visit the plant of the Nancy Ann Doll Company, which I did, and at that time I met Mr. Rowland, who showed me around the plant, showed me what he was doing in the way of dressing dolls, and he also asked me if I could make bisque dolls, and I told him I could, and there followed a discussion then of how many dolls he would need. Then he again asked me—he was very anxious at that time to know whether or not I could make dolls, and I started shortly after that to make the dolls.

Q. (By Mr. Orr): And that was your first experience in the doll business? A. Yes, sir.

Q. And your arrangement with the Nancy Ann organization continued for how long?

A. Well, that is a little vague in my memory; it must have been some time in 19—I don't remember the date exactly.

Q. As near as you can remember?

A. I have a note here some place. It was in '44—the end of '44, I believe—somewhere towards

(Testimony of Lester F. Hinz.)

the end of 1944. It was a drawn-out affair; it wasn't at any particular date; that is why I don't remember.

Q. At the time you began manufacturing doll bodies for the [310] Nancy Ann organization, were you supplied with a pattern or mold from which to pattern your work?

A. Yes, I was given a mold; that's right.

Q. Were you also given any instructions as to what kind of materials were to be used?

A. None whatsoever.

Q. Were suggestions made as to what was preferred by the Nancy Ann organization?

A. I don't know what you mean by suggestions. Do you mean so far as the technicalities?

Q. If you are distinguishing between being requested or it merely being suggested to you, I would like to know. Were different kind of materials discussed with Mr. Rowland or anyone connected with the Nancy Ann organization?

A. What kind of materials do you mean, Mr. Orr?

Q. For making the bodies. A. No.

Q. Was any particular kind of materials specified in your contract?

A. I had no contract in the first place, and there were no materials specified, sir. In fact, I used the same materials to make dolls that I used to make soap dishes and towel racks and other things I make in the plant.

(Testimony of Lester F. Hinz.)

Q. Following the termination of your contract with the Nancy Ann organization, did you continue to make and sell doll [311] bodies to others?

A. Yes.

Q. Ultimately you became interested in the Dollcraft Company which carries on the dressing of those bodies, is that right? A. Yes.

Q. Do you know Mr. Patterson?

A. Yes, I know Mr. Patterson.

Q. When did you become acquainted with him?

A. I can't answer that directly. I knew of Mr. Patterson while he was a salesman for the Nancy Ann corporation; I don't remember ever formally meeting the gentleman at that time.

Q. You were aware that he had acted as salesman for Nancy Ann?

A. Yes, vaguely I do. I think I did know that he was a salesman; it was of no importance to me at that time.

Q. Thereafter he became a salesman for you in selling doll bodies?

A. Yes, Kerr & Hinz, that is.

Q. Did he sell doll bodies for you before the first or the partnership of Kerr & Hinz was formed?

A. Did he sell doll bodies for me?

Q. Yes. A. No, sir.

Q. Not before you formed the partnership with Mr. Kerr?

A. No, he didn't sell doll bodies for me before we formed the partnership. [312]

Q. How long after the termination of your

(Testimony of **Lester F. Hinz.**)

working arrangement with Mr. Rowland was it that you formed the partnership with Mr. Kerr?

A. Well, my working arrangement with Mr. Rowland or the Nancy Ann Doll Company terminated in 1944, and it was some time in 1945 that I recollect that Mr. Patterson sold dolls for Kerr & Hinz.

Q. When was the Kerr & Hinz partnership formed? Was that in 1945?

A. Yes, I believe the early part—spring of 1945.

Q. Did Mr. Patterson begin selling for the Kerr & Hinz organization immediately upon its formation?

A. I do not believe that we had anything to sell immediately. It takes some time to get some dolls made.

Q. In the interval between the time you ceased making dolls for Nancy Ann and the time you began supplying doll bodies to Kerr & Hinz, did you sell any doll bodies to other purchasers?

A. I don't really remember; I don't think so, sir.

Q. When you formed the corporation Dollcraft—I understand that you were introduced to Mr. Juster by Mr. Patterson; is that correct?

A. Yes.

Q. Was there any proposal that Mr. Patterson become a stockholder or party to the corporation?

A. I don't ever recall a proposal of that [313] kind.

Q. Was there any discussion of any kind?

A. No, I don't remember any such discussion.

(Testimony of Lester F. Hinz.)

Q. When the corporation was formed, who suggested that the activity be transferred from San Francisco to your plant at Santa Clara?

A. I believe that was a consensus of opinion. It would be a much easier way to operate, and it would save freight on the dolls.

Q. Was it you that selected the location in the plant that they were to occupy?

A. Not exactly; in fact, it was decided mutually, because there were certain things they needed, such as light, and I just couldn't put them anywhere. There were girls that worked there and they had to have proper quarters.

Q. You, of course, as landlord determined the amount of rent to be paid; is that right?

A. Yes, I determined the amount of rent.

Q. And Dollcraft does pay rent to you for the quarters they occupy?

A. Yes, sir.

Q. The firm of Kerr & Hinz also occupies quarters in the Myers Ceramic Products Company plant, doesn't it?

A. Yes.

Q. Does the partnership also pay rent to you for their quarters? [314]

A. Yes, they do.

Q. You also make the doll bodies entirely as an activity of your Myers Ceramic Products Company, do you not?

A. Now?

Q. Yes.

A. No.

Q. You do not make the bodies themselves?

A. No.

Q. Where do you have those made?

(Testimony of Lester F. Hinz.)

A. They are made by another company. Kerr & Hinz now buys their doll bodies from others.

Q. They do not use doll bodies made by your organization?

A. I have discontinued making doll bodies, sir.

Q. When did you discontinue making the bisque bodies? A. Last Christmas some time.

Q. Up to last Christmas did Kerr & Hinz purchase their supplies of doll bodies from you?

A. Yes, sir.

Q. That was an activity of your own organization? A. Yes, sir.

Q. Whatever profit was gained from the manufacture of those bodies was yours; is that correct?

A. If there was profit, yes.

Q. As I understand it, those doll bodies were processed by the Kerr & Hinz organization? [315]

A. Yes.

Q. That is, decorated, wigged, put in condition to be dressed? A. That is right.

Q. And then they were sold to manufacturers or others who had use for them, but primarily to manufacturers to dress, to make dressed dolls?

A. Well, not only to manufacturers.

Q. To organizations who applied garments to them to make them dressed dolls?

A. Yes, that is a natural——

Q. And Dollcraft is one of the customers of Kerr & Hinz? A. Yes.

Q. On all dolls that the organization Kerr &

(Testimony of Lester F. Hinz.)

Hinz sold to Dollcraft, you would participate in the profits, if any, as a partner of Kerr & Hinz?

A. Yes, sir.

Q. Then when those dolls were dressed and sold, you as a stockholder of Dollcraft Company would share in the profit, if any, made from the sale of those dolls?

A. Yes, sir.

Q. So you personally profit directly from the manufacture of the bodies, from their decoration and from the sale of the dressed dolls as the final product; is that right?

A. If there is a profit, yes, I do.

Q. I understand that Kerr & Hinz sell the doll bodies [316] to others than Dollcraft for purposes of decorating dolls. Do you know whether any of those other companies put out a doll bearing a name such as "Little Bo-Peep"?

A. I have no—I don't know.

Q. What would you estimate the net worth of Dollcraft Company to be at the present time?

A. Well, I would estimate somewhere between twenty and thirty thousand dollars. That is merely a guess.

Q. And at what figure would you estimate the net worth of the organization Kerr & Hinz?

A. Placing of values is a hard thing to do; I would say between fifty and a hundred thousand dollars.

Q. About where would you place the net worth of Myers Ceramic Products Company?

A. I don't really know. That is, values are hard

(Testimony of Lester F. Hinz.)

to say. Would you say what I would ask for the plant if I were to sell it, or what it is worth in real estate and properties? What do you mean?

Q. Net worth such as might appear in a financial statement.

A. In my own financial statement?

Q. Yes.

A. \$200,000 or \$300,000, sir.

Q. As a member of the directors of Dollcraft Company you attend their policy-forming meetings, don't you?

A. Occasionally. Not as many as I ought, [317] sir.

Q. Were you present at the time it was determined that individual names should be applied to the dolls previously put out as "Who Am I" dolls?

A. Yes, I believe I was.

Q. And whose suggestion was it that those names be applied?

A. I don't believe it was any single person's suggestion; it was a result of the discussion of the idea.

Q. And it was mutually agreed that it should be done? A. I think it was, yes.

Q. At the time you determined to apply those names to the "Who Am I?" Series dolls, were you aware that a number of them had been used for some time by the Nancy Ann organization?

A. Yes, I was.

Q. And were you aware that they had been registered?

(Testimony of Lester F. Hinz.)

A. Yes, I was aware that they had been registered.

Q. And you nevertheless endorsed the placing of those marks on your dolls with the knowledge that it would be an invasion of the rights of the Nancy Ann organization?

Mr. Mellin: Just a minute, your Honor. I think that calls for a legal conclusion as to what is an invasion of the rights. The fact is that they decided and did it. Whether it is an invasion of the rights is a question for this Court.

The Court: Sustained.

Q. (By Mr. Orr): You stated you were not now making bisque doll bodies for the Dollcraft organization. What sort of bodies [318] are being used in the Dollcraft dolls at the present time?

A. In the Dollcraft dolls?

Q. Yes. A. Bisque bodies, sir.

Q. What kind are being sold by Kerr & Hinz?

A. Some kind of bisque dolls.

The Court: What is a bisque body?

A. Bisque, that is unglazed ceramic, burnt clay.

Q. Do you produce that yourself?

A. Yes.

Q. Or buy it?

A. I produced it up until last Christmas, and now we are buying it.

Q. (By Mr. Orr): Who are supplying the bodies now?

A. It is a company known as the Merritt Doll Company.

(Testimony of Lester F. Hinz.)

Q. Where is it located?

A. I think it is El Cerrito.

Q. Do you have a financial interest in that company?

A. No, sir.

Q. Do you have any connection with it at all?

A. No.

Q. Does Mr. Kerr have any interest in that company?

A. No, there is no connection between any of the companies with the Merritt people.

Q. There is no connection between any of your companies and [319] the Merritt Doll people?

A. That's right; absolutely none.

Q. How many employees does the Dollcraft Company have at the present time?

A. I really don't know.

Q. Have you any idea how many they had this time last year?

A. No, sir, I don't.

Q. Who in your organization would be best able to supply that information?

A. Mr. Juster. He is the manager of the Dollcraft Company.

The Court: Approximately, if you know?

A. Oh, I would guess there is five or six people there working for the Dollcraft Company.

Mr. Orr: No further questions.

Cross-Examination

By Mr. Mellin:

Q. Mr. Hinz, you are an artisan so far as ceramic materials are concerned, are you not?

(Testimony of Lester F. Hinz.)

A. Yes.

Q. You were formerly a tile-setter?

A. Yes, sir, that is all I ever did; I was a tile-setter.

Q. And you became a manufacturer and you built your Myers Ceramic plant up from nothing to what it is? A. Yes, sir.

Q. And you actually worked hard to do that?

A. I have worked hard, yes. [320]

Q. Is there any difference between making ceramic or bisque doll bodies than there is other ceramic products?

A. With the possible exception of the shape of the mold.

Q. Otherwise the method is the same?

A. The method is exactly the same.

Q. And the clays you use are different or are the same?

A. The clays that I used to make dolls were exactly the same as the clay that I used to make the various ceramic articles that we made in the plant before we made the dolls.

Q. Is there some particular reason for you stopping making doll bodies—manufacturing doll bodies?

A. That always has been a very small part of the business of Myers Ceramic Products and it usually was more of a nuisance than it was a profit, because, as I say, tile is my business and the dolls usually took up space in the kilns and around the plant that the tiles used to take, so I decided at

(Testimony of Lester F. Hinz.)

Christmas time, this last Christmas, to discontinue the manufacture of bisque doll bodies.

Q. So that you could make more tile?

A. Yes, sir.

Q. What was disclosed by Mr. Rowland or by Mr. Anderson at the time that you were asked to make doll bodies for Nancy Ann?

A. What did they give me as the information, you mean, sir?

Q. Yes. [321]

A. They gave me no information so far as the manufacture of doll bodies.

Q. They supplied you a sample doll?

A. I believe they supplied a mold that had been made by others; that is all I remember.

Q. Did you do anything to the mold?

A. I made a doll from the mold and remodeled it.

Q. Did you subsequently make other molds?

A. Yes.

Q. Did you have a substantial investment in special equipment for making dolls?

A. Yes, because of the volume of dolls that the Nancy Ann Company required, it was necessary for me to invest in equipment and molds to carry on that business and deliver the dolls to the Nancy Ann Company.

Q. Did they share in any of that investment? I mean, directly?

A. Neither directly or indirectly did the Nancy

(Testimony of Lester F. Hinz.)

Ann Company ever have anything in the Myers Ceramic Products Company.

Q. Do you take any active part in the management of Dollcraft Company?

A. I don't have time, sir; I take no active part in the management.

Q. What about Kerr & Hinz? Do you take any active part in that?

A. A little, but Mr. Kerr is a very capable man and operates [322] that part of it.

Q. Your time is spent primarily in Myers Ceramic, is it? A. Yes, sir.

Q. Did Mr. Rowland ever supply you with any formula for making dolls?

A. No, he did not, sir.

Q. Did you answer the question: Is there any difference in making dolls than any other ceramic product, as far as your plant is concerned?

A. There is no difference, yes.

Mr. Mellin: That is all.

Redirect Examination

By Mr. Orr:

Q. Molds are commonly used in your plants for molding various kinds of articles, are they not?

A. Yes, sir.

Q. And is the cost of the mold ordinarily figured into the article that you propose to sell that is made from that mold?

A. The custom is to distribute the cost of molds over a period of time, yes, sir.

(Testimony of Lester F. Hinz.)

Q. And is that the case in the Nancy Ann Doll situation? A. Yes, sir.

Q. And was the price of those molds amortized over the period that you were making dolls?

A. I never was quite sure of that.

Q. You were paid for the dolls that you made and delivered [323] to Nancy Ann?

A. Yes, sir.

Mr. Orr: That is all.

Mr. Mellin: No further questions.

The Court: You are an ex-tile-setter?

A. I started as a tile-setter myself.

Q. Where? A. In San Francisco.

Q. How long did you remain at that?

A. I started as a tile-setter in 1926 and I set tile until 1936. I was a tile-setter until that time, and for a short while I was a contractor; I hired men and worked with them.

Q. When did you move down the Peninsula?

A. The man after whom the plant is named, Mr. Myers, was a friend of mine, and he was a tile manufacturer, and he asked me if he took over a tile plant or ceramic plant would I set the tile that he made, and we agreed to that and formed this partnership. And then he suddenly died and I had to then discontinue tile-setting and go down to the plant and take over there.

Q. Where is the plant located?

A. Just outside of Santa Clara.

Q. Where do you get the material that you make the tile from?

(Testimony of Lester F. Hinz.)

A. Most of the clays—that is the clay that forms the body of the tile—comes from the Death Valley, your Honor, in [324] Southern California. We use a lot of talc.

Q. What? A. Talc.

Q. What is talc?

A. The same material talcum powder is made out of. We grind it and form dolls from it.

Q. It is porous?

A. Yes. We make what is called bisque presses. We press the damp clay, then make a figure, then we fire it and put a glaze on it.

Q. What do you produce now?

A. You mean what type of materials?

Q. Yes.

A. We make a floor line—a wall and floor line, that is, for bathrooms and kitchens; we make a line of accessories such as towel bars and soap dishes and paper holders. They are made by the cast process; that is, we cast those in the same method that we cast dolls. They are not pressed. The tile is pressed, but these accessories that we make, they are cast.

Q. Forms?

A. That's right; we pour them into the plaster mold, pour the excess out, let it sit, take the mold away, let it dry and then we glaze it.

Q. What is the glazing process? Is it fired?

A. Yes, the basis of that is usually ground glass to which we [325] add metal oxides that in the heat give the glaze and color, but in the heat the glaze

(Testimony of Lester F. Hinz.)

comes to a melt—we don't let them run—it just comes to a melt and we hold it there, so that when the tile comes out it has a smooth, glazed surface. These oxides that we add in the ground-glass compounds is what gives it the various colors.

Q. How many men do you employ?

A. I have now about 33 men, including three women.

One of the girls sorts tile. One is a very good kiln setter. She simply bosses on a small kiln we have. And I have a girl in the office.

Q. What do you fire the kilns with?

A. Natural gas. We have obtained a standby in the real cold weather.

Q. Do you get enough heat from gas?

A. Not exactly. You must mix air or oxygen with gas in order to get the high temperature we require; gas itself alone will not give you high heat.

Q. You run that business yourself?

A. Yes, sir. I am the sales manager, the president and technician, and the whole business.

The Court: I am glad to see a tile-setter useful. All right. Step down.

Mr. Orr: The question Mr. Hinz couldn't answer I would like to ask of Mr. Juster. [326]

Mr. Mellin: What is that?

Mr. Orr: The number of employees this time last year.

MAURICE JUSTER

recalled for further cross-examination.

By Mr. Orr:

Q. You stated a little while ago that you had seven employees at the present time? A. Yes.

Q. How many did you have this time last year?

A. Approximately the same number.

Q. And how does the amount of outside contract work compare? A. About the same.

Mr. Orr: That is all.

Mr. Mellin: No questions.

The Court: You may step down.

Mr. Orr: At this time I would like to offer in evidence the depositions of Mr. Juster, Mr. Robert E. Kerr and Mr. Lester E. Hinz, taken Friday, January 20, 1950, together with the paper exhibits that were attached thereto.

The Court: Let them be admitted and marked. No objection.

(Depositions of Mr. Juster, Mr. Kerr and Mr. Hinz referred to were thereupon marked Defendant's Exhibit P in evidence.)

Mr. Orr: That will conclude the case for the defendant and cross-complainant.

Mr. Mellin: We offer no rebuttal, your [327] Honor.

We are ready to submit the case.

The Court: Is the matter submitted on both sides?

Mr. Mellin: Yes, your Honor, as far as I am concerned.

Mr. Orr: I would like to have an opportunity to argue it, either orally or by brief.

The Court: How much time do you wish?

Mr. Mellin: What about submitting it on briefs?

Mr. Orr: That is what I suggested. A week or ten days.

The Court: For argument?

Mr. Orr: No, for presenting a brief. For argument I would like about an hour and a half, I think, or two hours to be orally argued.

Mr. Mellin: I am wondering if we couldn't save time if we just submitted it to the Court on briefs on the legal questions. We would take very little time. We would be willing to take five days for the plaintiff and ten days for the defendant.

The Court: What is the question for decision, gentlemen?

Mr. Mellin: The question, your Honor, is whether or not these marks are valid trade-marks, whether or not the defendant has infringed, and whether or not there has been unfair competition.

The Court: Whether or not they are valid trade-marks?

Mr. Mellin: Yes, your Honor. There are in this proceeding a group of about eleven marks. They are set out in the pleadings. [328]

Mr. Orr: They are set out in the pleadings, but there are a number of marks and they will require a separate discussion and a separate evaluation. The factors affecting one group of marks will not

affect others. So that there are several marks and several types of marks that will require separate consideration in connection with your determination whether or not the mark is valid and whether or not it has been infringed, and in addition to the question of infringement, and regardless of the validity, whether or not there has been unfair competition.

The Court: There is no question about the evidence.

Mr. Mellin: No, your Honor.

Mr. Orr: As I say, I have never seen a case where there has been so little dispute about the facts.

The Court: That is helpful. It doesn't resolve itself into a question of fact, then.

Mr. Mellin: That is exactly our position.

The Court: I think both of you gentlemen are familiar with your positions——

Mr. Mellin: Yes, your Honor.

Mr. Orr: Very much so.

The Court: ——now as well as you will be at any time.

Mr. Mellin: Yes, your Honor. That is so.

The Court: I think while we all have it fresh in our minds we will go on now, or I will give you until tomorrow [329] morning to prepare.

Mr. Orr: I would like to come out tomorrow morning.

The Court: That will give you some time to prepare.

Mr. Mellin: 10:00 o'clock, sir?

The Court: 10:00 o'clock tomorrow morning.

Mr. Orr: Very well.

Mr. Mellin: Would the Court set thirty minutes to a side?

The Court: No, I will not fix a time.

Mr. Mellin: I thought you said an hour.

The Court: You can fix the time now if you want, on both sides, whatever time you wish.

Mr. Mellin: As far as we are concerned, in deference to counsel, 30 or 45 minutes per side.

Mr. Orr: I think I would want an hour.

The Court: Then you will have an hour each tomorrow morning.

Mr. Mellin: Yes, your Honor.

The Court: We will put it over until tomorrow morning at 10:00 o'clock, August 24.

(Thereupon an adjournment was taken to tomorrow, Thursday, August 24, 1951, at 10:00 o'clock a.m.)

Certificate of Reporter

I, Official Reporter, and Official Reporter pro tem, certify that the foregoing transcript of 330 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ W. A. FOSTER.

[Endorsed]: Filed May 26, 1951. [330]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true copies of minute orders entered in this Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorneys for the Appellant:

Complaint.

Motion for preliminary injunction.

Temporary restraining order.

Notice of motion and motion for an order vacating temporary restraining order.

Verification of complaint.

Affidavit of Oscar A. Mellin, filed November 9, 1949.

Affidavit of Lester F. Hinz, filed November 9, 1949.

Order denying motion to vacate temporary restraining order.

Affidavit of Lester F. Hinz, filed November 16, 1949.

Notice of motion and motion for leave to join additional parties plaintiff and for issuance of summons, etc.

Affidavit of A. L. Rowland, filed November 18, 1949.

Affidavit of Lester F. Hinz, filed November 21, 1949.

Affidavit of Elise Juster, filed November 21, 1949.

Affidavit of Robert E. Kerr, filed November 21, 1949.

Order denying motion for preliminary injunction without prejudice and reserving ruling on motion to join parties plaintiff.

Defendant's answer and counterclaim.

Order for issuance of summons.

Motion to vacate order for issuance of summons or to dismiss counterclaim.

Affidavit of Lester F. Hinz, filed February 4, 1950.

Order denying motion to vacate order for issuance of summons, etc., without prejudice.

Answer to counterclaim.

Opinion.

Findings of fact and conclusions of law.

Judgment.

Motions by defendant for a new trial, to amend findings and to amend judgment.

Order denying motion for new trial; allowing amendment to Finding 11, and denying motion for other amendments of findings and judgment.

Notice of appeal.

Bond for costs on appeal.

Order extending time to file record on appeal to April 29, 1951.

Order extending time to file record on appeal to May 27, 1951.

Designation of record on appeal.

Deposition of Allan L. Rowland.

Depositions of Maurice Juster, Robert E. Kerr
and Lester F. Hinz.

Reporter's Transcript for August 21, 22, 23, 1950.

Plaintiffs' Exhibits 1 to 60, inclusive.

Defendant's Exhibits A to O, inclusive.

In Witness Whereof, I have hereunto set my hand
and affixed the seal of said District Court this 26th
day of May, 1951.

[Seal] C. W. CALBREATH,
 Clerk.

By /s/ C. M. TAYLOR,
 Deputy Clerk.

[Endorsed]: No. 12953. United States Court of
Appeals for the Ninth Circuit. Nancy Ann Story-
book Dolls, Inc., a Corporation, Appellant, vs. Doll-
craft Company, a Corporation; Lester F. Hinz and
Robert E. Kerr, Appellees. Transcript of Record.
Appeal from the United States District Court for
the Northern District of California, Southern Divi-
sion.

Filed May 26, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12953

DOLLCRAFT CO., a Corporation; LESTER F.
HINZ, ROBERT E. KERR,

Plaintiffs-Counter-Defendants,

vs.

NANCY ANN STORYBOOK DOLLS, INC., a
Corporation,
Defendant-Counter-Claimant.

CONCISE STATEMENT OF DEFENDANT-
APPELLANT'S POINTS ON APPEAL
PURSUANT TO F.R.C.P. 75 (d)

Now comes the defendant-appellant, Nancy Ann Storybook Dolls, Inc., and having heretofore designated that the record on appeal shall contain the complete record and all the proceedings and evidence in the action (but not including the briefs and memoranda of points and authorities heretofore filed in behalf of the parties in the course of the proceeding), now makes the following statement of points on which it intends to rely for appeal to the United States Court of Appeals for the Ninth Circuit from the order and judgment of the above-entitled court in the above-designated action:

1. The United States District Court erred in holding invalid and in ordering the cancellation of appellant's registration of the trade-marks:

No. 389115—"Storybook"

No. 395451—"Goldilocks"

No. 395454—"Little Bo-Peep"

No. 403261—"June Girl"

No. 404576—"Mistress Mary"

No. 404581—"Curly Locks"

No. 404586—"Little Miss Donnett"

No. 420077—"Red Riding Hood"

No. 432208—"Little Miss Muffett"

No. 525896—"Story"

2. The United States District Court erred in holding that appellant's trade-marks listed under numbered Paragraph 1 above were not validly registered by the United States Patent Office.

3. The United States District Court erred in failing to hold that the trade-marks designated under numbered Paragraph 1 above were validly registered by the United States Patent Office.

4. The United States District Court erred in failing to hold that the trade-marks designated under numbered Paragraph 1 above have been infringed by appellees and each of them.

5. The United States District Court erred in failing to rule that the individual defendants Lester E. Hinz and Robert E. Kerr are jointly and severally liable for infringement of appellant's trade-mark rights in the registered trade-marks involved in the above-designated action.

6. The United States District Court erred in failing to award to appellant-counter-complainant

damages, costs, expenses and attorney fees in the above-entitled action.

7. The United States District Court erred in awarding to appellee its costs and expenses in the above-entitled action.

8. The United States District Court erred in failing to rule that each and all of appellant's trade-marks involved in the above-entitled action are valid, and that the same have been infringed by defendants; and in failing to award to appellant: damages for past infringement; an injunction restraining future infringement of those marks held invalid; and its costs, expenses and attorney fees in the proceedings.

Dated at San Francisco, California, this 6th day of August, 1951.

/s/ HUGH N. ORR,

/s/ WM. G. McKAY

Attorneys for Appellant.

Receipt of copy acknowledged.

